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In re Radical Interpretations of American Law: The Relation of Law and History

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IN RE RADICAL INTERPRETATIONS OF AMERICAN LAW: THE RELATION OF LAW AND HISTORY

A.E. Keir Nash*

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INTRODUCTION

The past decade has seen the emergence of at least four types of analysis of American law that variously challenge conventional legal research undertaken within the intellectual boundaries of American empirical and normative pragmatism. Two of these types — post-

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I wish to thank Martin Shapiro for critiquing an earlier draft of this article and making valuable suggestions—some of which I followed.

positivist legal philosophy¹ and Posnerian neo-positivist economic-legal analysis² — have been much debated elsewhere³ and are only peripherally touched upon in this Article. Neither is primarily concerned with assessing the historical relationships among American law, polity, and economy for any reason, whether to understand a historical problem in itself, to develop a historically grounded theory of the American legal experience, or to ascertain the limits, if any, that history places upon the law's role in the solution of contemporary American problems.

This Article centers instead upon assessing two types of legal analysis — non-Marxist radical interpretation and “non-reductionist” Marxist theory — which, despite conspicuous differences, share the belief that understanding the American historical experience is a prerequisite to understanding American law. Both approaches also share two other important convictions. One is that a “consensual” or “liberal pluralist”⁴ version of American history has little explanatory

1. See, e.g., B. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980); R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1978); R. NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974); J. RAWLS, *A THEORY OF JUSTICE* (1971). For a useful overview and critique of Rawls, Nozick, and utilitarian philosophy, see P. PETTIT, *JUDGING JUSTICE: AN INTRODUCTION TO CONTEMPORARY POLITICAL PHILOSOPHY* (1980).

2. See R. POSNER, *ECONOMIC ANALYSIS OF LAW* (2d ed. 1977); Posner, *Some Uses and Abuses of Economics in Law*, 46 U. CHI. L. REV. 281 (1979); Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979).

3. See, e.g., READING RAWLS: CRITICAL STUDIES ON RAWLS' *A Theory of Justice* (N. Daniels ed. 1975); Coleman, *Efficiency, Exchange, and Auction: Philosophic Aspects of the Economic Approach to Law*, 68 CALIF. L. REV. 221 (1980); *A Spectrum of Responses to John Rawls's Theory*, 69 AM. POL. SCI. REV. 588 (1975) (articles by Chapman, Harsanyi, Van Dyke, Fishkin, Rae, Bloom and Barber); *Jurisprudence Symposium*, 11 GA. L. REV. 969 (1972) (discussing Dworkin); *Symposium on Efficiency as a Legal Concern*, 8 HOFSTRA L. REV. 485 (1980) (on economics and law); *Change in the Common Law: Legal and Economic Perspectives*, 9 J. LEGAL STUD. 189 (1980).

4. “Consensual” is the term many American historians favor, while “liberal pluralist” is the one that political scientists typically use. Each term amounts to much the same view of American history and contemporary politics, emphasizing the broad measure of agreement on Lockean liberal political philosophy and the consequent generally low level of conflict perceived to characterize the course of United States history. In 1955, Professor Louis Hartz wrote a brilliant book, *The Liberal Tradition in America*, arguing that America

was the prisoner of a bourgeois frame of political reference that had forestalled the development of either a strong radical or a strong conservative political tradition The only political theorist for Americans, Hartz insisted, was the quintessential bourgeois Englishman, John Locke. . . . Hartz's book captured the imagination of a generation of students of American culture.

Howe, *European Sources of Political Ideas in Jeffersonian America*, 10 REVIEWS IN AM. HIST. 28, 28 (1982). For some examinations of new American historiographical trends that question Hartz's consensual interpretation, see Bartley, *In Search of the New South: Southern Politics After Reconstruction*, 10 REVIEWS IN AM. HIST. 150 (1982); Chudacoff, *Success and Security: The Meaning of Social Mobility in America*, 10 REVIEWS IN AM. HIST. 101 (1982); Foner, *Reconstruction Revisited*, 10 REVIEWS IN AM. HIST. 82 (1982); Hollinger, *American Intellectual History: Issues for the 1980s*, 10 REVIEWS IN AM. HIST. 306 (1982); Rodgers, *In Search of Progressivism*, 10 REVIEWS IN AM. HIST. 113 (1982); Wilentz, *On Class and Politics in Jacksonian America*, 10 REVIEWS IN AM. HIST. 45 (1982).

validity, at least in regard to such major problems as the political and legal breakdown represented by the Civil War, and the law's role in American economic development. They also agree that historical explanations which downplay discussion of economic forces in the law's evolution are explanations which downplay truth. These common convictions cause me to group these two approaches, despite their deep-seated differences, as "radical interpretations of American law."

One of these radical interpretations is explicitly Marxist. The other is not. This observation suggests perhaps the most important of three major differences. That difference has to do with the extent to which American law has merely reflected the economic and political interests of dominant groups or classes versus the extent to which American law has had a separate life of its own, evolving autonomously from the larger polity or economy. Surprisingly, at least for those whose understanding of Marxism was formed before the 1970s, the current sophisticated Marxist view is the less determinist of the two radical interpretations. Indeed, this type of Marxist view strongly criticizes non-Marxist radical interpretations for engaging in "instrumental reductionism" — for adopting a view of American legal history that reduces American law to a mere instrument of dominant classes.

The second difference flows from the first. It is that contemporary American Marxist analysis displays fairly intense concern for working out knotty aspects of the problem of the law's autonomy, while contemporary non-Marxist radical analysis does not. In this sense, non-Marxist radical analysis is simultaneously closer to, and further from, more conventional liberal-individualist and American conservative interpretations of law in society. On the one hand, its almost "populist" simplicity as to who gets what and who doesn't, and its tendencies to quasi-melodrama about who controls the law and who doesn't, make it seem very much in the American tradition. On the other hand, the result of that quasi-melodramatic approach — yielding less autonomy to the law — places it analytically further away from formalist legal approaches than is current American Marxist analysis.

The third major difference pertains to scope. Non-Marxist analysis, uninterested in — or, if you prefer, unencumbered by — the task of working out a general theory of American law, tends to be much more compartmentalized in its analysis on two chief counts. First, it compartmentalizes quite unself-consciously within history, both as to time and geography as well as to legal subject. Thus, it is

not fazed by the compartmentalization entailed in writing about the transformation of American law using nineteenth century industrialization as the explanation and Northeastern United States private law as the dominant data base — while largely ignoring relationships among Northeastern and Southern or Middle Western economies and relationships between constitutional and private law.⁵ Similarly, in analyzing the law's role in the quarrel over slavery, non-Marxist radical analysis separates problems of comity-and-slavery from relationships with the criminal administration of justice in a slave society or from relationships with issues of economic growth and competing economic forms.⁶ In marked contrast, Marxist analysis, which aims at a general theory of American law in its more ambitious moments, is both considerably more holistic and considerably more troubled by the way in which different "parts of history" fit together. The second major count on which Marxist theory is less compartmentalized pertains to time past and time present. Marxist analysis has much more to say about contemporary problems in American law and polity and their linkages to the past.

These differences and similarities account for the structure of this Article. Part I undertakes, after briefly comparing Marxist and non-Marxist radical approaches to analyzing the law of American slavery, to assess Paul Finkelman's *An Imperfect Union*,⁷ the most recent substantial non-Marxist radical essay on the subject. This task is undertaken first because it is, from a nonradical perspective, more straightforward.

Part II lays the ground for understanding and evaluating Marxist analysis of American law. It focuses primarily on the work of Mark

5. See M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977); see also L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* (1973). For a good defense of this approach, see L. Friedman, *The Law Between the States: Some Remarks on Southern Legal History* (unpublished paper delivered at the Second Conference on Southern Legal History, Gulfport, Mississippi, Feb. 1983). In regard to the tendency of books on 19th American law to downplay or omit Southern legal history, Friedman observes:

Why are these Southern instances ignored? Simply because, from the standpoint of the North, including Northern courts, they were regional . . . not mainstream . . . [I]n the nineteenth-century, there was a commonly accepted *core* of the legal system; and it was certainly not in the South . . . [T]oday . . . the core has been redefined. California is the most frequently cited state court today . . . This has to be recognized. Keir Nash, in a rather nasty passage in . . . "Reason of Slavery" which appeared in . . . the *Vanderbilt Law Review*, in 1979 . . . accused me of appalling sloppiness and ignorance on this subject . . .

Id. at 6-7. It was a nasty passage. The devil made me do it.

For a favorable commentary on Horwitz's book, see Nash, *Book Review*, 73 *AM. POL. SCI. REV.* 244 (1979).

6. See P. FINKELMAN, *AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY* (1981).

7. *Id.*

Tushnet, the Marxist scholar whose work to date most amply covers issues in both contemporary American law and American legal history even as it exemplifies and enunciates some of the problems inherent in working out an adequate Marxist theory of American law. Part II lays this ground in three steps. First, it briefly examines the reactions of non-Marxist legal historians to Tushnet's principal historical work, *The American Law of Slavery, 1810-1860*.⁸ Second, it examines in parallel fashion non-Marxist reactions in the area of Tushnet's other major concentration, current issues in constitutional law. Both sets of reactions indicate a "threshold problem" that Marxist legal scholars face: getting their arguments read accurately and taken seriously. Thus, the third step consists of removing some of the barriers to understanding by "defanging" Marxist language that appears particularly troublesome to non-Marxists, and by describing what contemporary Marxist scholars such as Tushnet take to be appropriate goals for Marxist analysis of American law.

An additional aspect of this analysis, to be explored in a later article, will undertake to evaluate Marxist work in the areas of current constitutional law and the legal history of slavery, focusing again primarily but not exclusively on "Tushnetian Marxism." That analysis will develop two main themes. The first is whether and to what extent Tushnetian criticism of contemporary legal scholarship flows from an internally coherent Marxist theory, or from a less coherent series of Marxist insights, or from something much less "foreign" — to wit, "Neo-Legal-Realism" run rampant. The second main theme is the adequacy and promise of such criticism, regardless of its intellectual origin, as it pertains to four areas of intense current controversy: slavery's legal history, the defensibility of constitutional structural review, the question of interpretivist versus noninterpretivist constitutional construction, and the viability of "democratic-process-protecting" judicial review versus "substantive-due-process review revived."

I. NON-MARXIST RADICAL INTERPRETATION: CONFLICT OF LAWS AND THE LEGAL HISTORY OF SLAVERY

A. *Comparing Marxist and Non-Marxist Approaches to Analyzing the Law of Slavery*

Finkelman's *An Imperfect Union* and Tushnet's *The American Law of Slavery, 1810-1860*, together with Eugene Genovese's lengthy review essay, *Slavery in the Legal History of the South and the Na-*

8. M. TUSHNET, *THE AMERICAN LAW OF SLAVERY, 1810-1860* (1981).

tion,⁹ suggest the rough contours of a radical interpretation of the relations between law and society in the era of American slavery.¹⁰ These analyses also suggest some major obstacles to a comprehensive radical interpretation of the development of American law. Although I shall at times criticize the manner in which Tushnet and Finkelman marshal and assess evidence, even where I disagree on the specifics I am fairly sympathetic to their main purposes, more so, I expect, than a number of other commentators.¹¹ To the extent that Finkelman attempts to relate the judiciary and slave law to the coming of the Civil War and to the extent that Tushnet tries to provide both a "Restatement" of the law of slavery¹² and an account of rela-

9. Genovese, *Slavery in the Legal History of the South and the Nation* (Book Review), 59 TEX. L. REV. 969 (1981). A version of Genovese's essay that has been expanded to include analysis of Morton Horowitz's writings has just appeared in L. FOX-GENOVESE & E. GENOVESE, FRUITS OF MERCHANT CAPITAL: SLAVERY AND BOURGEOIS PROPERTY IN THE RISE AND EXPANSION OF CAPITALISM 337 (1983).

10. Although I say here "a radical interpretation," Finkelman's approach, see Part I-A *infra*, differs significantly from those of Tushnet and Genovese, which are much more explicitly Marxist. Finkelman's radicalism is almost as chaste of leftist "deep structure" as the McGovernite 1972 Democratic Party National Platform. Tushnet, by contrast, is striving for systematic critical analysis, even if his results often appear no more threatening to American capitalism and its legal-historical superstructures than the Faculty Club luncheon menu at the University of Belgrad.

11. Finkelman's book has come off quite well, though it has taken occasional knocks. See Ely, Book Review, 69 CALIF. L. REV. 1755 (1981); Jackson, Book Review, 66 J. NEGRO HIST. 329 (1981) (a much less analytical review); see also Reid, *Lessons of Lumpkin: A Review of Recent Literature on Law, Comity, and the Impending Crisis*, 23 WM. & MARY L. REV. 571 (1982). Reid is good reading but not, on this subject, well-read. *Lessons of Lumpkin* proceeds on the basis of two mistakes. Mistake One is assuming that the most vocal case is also indicative of Southern judicial attitudes in general. "Of these [Deep South] states, none should be more revealing than Georgia." *Id.* at 578. Why should it be? Prior research suggests the contrary. That indicates Mistake Two — giving us as if novel and probably representative what is at least a thrice-told tale of uniquely ardent pro-slavery rhetoric in the antebellum Georgia Supreme Court under Chief Justice Joseph Lumpkin. See Nash, *The Texas Supreme Court and Trial Rights of Blacks 1845-1860*, 58 J. AM. HIST. 622, 624 n.11 (1971) [hereinafter cited as Nash, *Trial Rights of Blacks*] ("The Georgia supreme court, from its creation in 1845, had the solitary distinction of being the only continuously pro-slavery, 'fire-eating' state supreme court."); see also Nash, *Reason of Slavery: Understanding the Judicial Role in the Peculiar Institution*, 32 VAND. L. REV. 7, 104-23 (1979) [hereinafter cited as Nash, *Reason of Slavery*]; Stephenson & Stephenson, "To Protect and Defend:" *Joseph Henry Lumpkin, The Supreme Court of Georgia, and Slavery*, 25 EMORY L.J. 579 (1976). Generally, Reid's essay takes analysis of the law of slavery backward rather than forward. For forward progress, see Morris, "As if the Injury was Effected by the Natural Elements of Air, or Fire": *Slave Wrongs and the Liability of Masters*, 16 LAW & SOC. REV. 569 (1981-1982).

Tushnet's book has taken harder knocks. Except for Genovese's extended paean, see Genovese, *supra* note 9, at 998, the more substantial reviews have ranged from somewhat to very critical. See, e.g., Finkelman, *The Peculiar Laws of the Peculiar Institution* (Book Review), 10 REVIEWS IN AM. HIST. 358 (1982); Watson, *Slave Law: History and Ideology* (Book Review), 91 YALE L.J. 1034 (1982). But see Wiecek, Book Review, 1982 AM. B. FOUND. RESEARCH J. 274 (mixed review). For generally favorable shorter reviews, see Hall, Book Review, 87 AM. HIST. REV. 855 (1982); Hyman, Book Review, 69 J. AM. HIST. 158 (1982).

12. See M. TUSHNET, *supra* note 8, at 9.

tionships among the law, ideology and economy of slavery, each is pursuing worthwhile objectives.

It is important to understand at the outset the major differences in the purposes and methods of Finkelman and Tushnet. Unlike Tushnet's book, which explicitly doubts the utility of legal decisions in illuminating attitudinal currents in political history,¹³ Finkelman's *An Imperfect Union* is legal history solidly anchored in political and social history. Where Tushnet's core aim is "to pry apart the cases to disclose the ordering implicit in slave law,"¹⁴ Finkelman is as interested in using the materials of legal history to explain the impending Civil War as he is in using political events to clarify the development of the law of slavery. Where Tushnet's version of Marxist analysis¹⁵ rejects "[c]riteria of justice and fairness . . . [as] far too simple . . . ordering principles,"¹⁶ Finkelman frequently evaluates developments in those terms. Thus, for example, he evaluates state supreme courts in terms of their "fidelity to law" and "impartiality of decision making."¹⁷ In marked contrast, Tushnet's primary search is for a structure of rules evolving toward autonomy from Northern and British nineteenth century law and toward semi-autonomy from the economic substructure of slavery.¹⁸ It is almost as if Tushnet's perfect analytic product would be an a-chronological distillate from his-

13. See *id.* at 11-27. Note, however, that Tushnet does not reject judicial opinions as "a useful source of insight into the ideological structures from which slavery drew support." *Id.* at 11.

14. *Id.* at 25.

15. I say "Tushnet's version" advisedly because scholars differ as to whether Marx himself thought, and whether modern Marxists should think, it analytically meaningful to assess capitalist and other pre-revolutionary legal structures in terms of moral categories, such as justice, injustice, fairness, unfairness, and the like, that transcend the then-prevailing mode of production. Compare Wood, *The Marxian Critique of Justice*, in *MARX, JUSTICE, AND HISTORY* 3 (M. Cohen, T. Nagel & T. Scanlon eds. 1980) (Marx does not condemn capitalism as unjust), with Husami, *Marx on Distributive Justice*, in *MARX, JUSTICE, AND HISTORY*, *supra*, at 42 (Marx does condemn capitalism as unjust).

16. M. TUSHNET, *supra* note 8, at 25.

17. P. FINKELMAN, *supra* note 6, at 182.

18. Exactly what Tushnet means by autonomy of the law of slavery has given non-Marxist analysts trouble. See, e.g., Wiecek, *supra* note 11, at 277:

Tushnet posits that the law, as a social artifact, exercises a "relative autonomy" in any society, a position that I find odd from one operating within a Marxian framework. Tushnet maintains this position as a more acceptable alternative to a view that he ascribes to Elkins and others who saw law as nothing more than a reflex of economic or social relationships in society. But where, in Marxian terms, the superstructure of a society is determined by the relations of production, it is difficult to see law as being anything but a reflection of the interests of the hegemonic classes.

The source of some of the difficulties may be indicated by Finkelman's remark that "to be blunt, this is one of the most poorly written books I have ever reviewed." Finkelman, *supra* note 11, at 358. That seems a bit harsh. At least some of the complexity *is* in the eye of the non-Marxist beholder *ex necessitate*. For discussion of a similar misreading of Tushnet by Nash, see L. FOX-GENOVESE & E. GENOVESE, *supra* note 9, at 372.

tory — as if he wished to map a timeless, perfected form of slave law upon the historiographical equivalent of Keats' Grecian urn, to transfix it there, forever changeless and beyond all human passion.¹⁹ In marked contrast, Finkelman takes us through an analysis whose temporal progressions are far more familiar to the pragmatic American historical sensibility.

This, however, does not mean that Finkelman is right and Tushnet wrong. At a minimum, we should consider the potential relevance of Fredric Jameson's comment that the empiricism of the Anglo-American analytic tradition, though intimately tied to philosophic liberalism, is profoundly conservative in its political consequences. Thus:

[T]he bankruptcy of the liberal tradition . . . does not mean that it has lost its prestige or ideological potency. On the contrary: the anti-speculative bias of that tradition, its emphasis on the individual fact or item at the expense of the network of relationships in which that item may be embedded, continue to encourage submission to what is by preventing its followers from making connections, and in particular from drawing the otherwise unavoidable conclusions on the political level. It is therefore time for those of us in the sphere of influence of the Anglo-American tradition to learn to think dialectically, to acquire the rudiments of a dialectical culture and the essential critical weapons which it provides.²⁰

Although this Article is hardly the place to venture a complete dialectic education, we should note the difficulties that the dialectic writer's basic formal problem imposes for understanding legal history:

He who has so intense a feeling for the massive continuity of history itself is somehow paralyzed by that very awareness. . . . Where all the dimensions of history cohere in synchronic fashion, the simple linear stories of . . . historians are no longer possible: now it is diachrony and continuity which become problematical²¹

That problem is substantial. Equally troubling is the second-order problem produced by the critical reflexes of Anglo-American traditional minds reacting to essays venturing a dialectic interpretation of legal history. These problems are not restricted to the dialectical historian alone — at least if those of us who are not Marxists (or Hegelians) wish to avoid ruling out *ab initio* a possible truth or two. We

19. See J. KEATS, *Ode on a Grecian Urn*, in THE POETICAL WORKS OF JOHN KEATS 295-97 (H. Forman ed. 1908). My point in making this reference is to single out this characteristic in Tushnet's intellectual modeling because it has vexed others as if it arose regardless of, rather than in substantial measure due to, the Marxist analysis.

20. F. JAMESON, MARXISM AND FORM: TWENTIETH CENTURY DIALECTICAL THEORIES OF LITERATURE at x-xi (1971).

21. *Id.* at 50-51.

make, after all, two assumptions about the relationships among form, knowledge, and truth that the dialectician does not. One is that truth of a historical sort is best captured in a narrative essay. In contrast, the dialectician's "larger form will . . . be a construct rather than a narrative."²² Our other assumption is that, though truth is captured in the narrative form, the capturing is best done via facts that are both separable from the language used to narrate them and selected and arranged in objectified, if not objective, structures by a narrating subject (an author) whose subjectivity and subjective relations with the objectified facts are (on behalf of both good form and maximized knowledge) kept well suppressed. For us, good taste, factual thickness, and subjective detachment go hand in hand. They yield sufficient insight if not systematic explanation. But is that necessarily so?

B. *Finkelman's Instrumentalist "Breakdown of Comity" Thesis*

Finkelman's central argument is that decision making in the antebellum state court systems, both North and South, roughly paralleled the development of broader political opinion about slavery and the Federal Union. Specifically, he contends that the willingness of Northern judiciaries to honor, out of comity, laws and decisions of Southern states — and vice versa — moved through three phases. In the first phase, extending from the ratification of the Constitution to roughly 1830, slave states and free states "tried to accommodate each other in a spirit of comity and national unity" despite their "competing interests and ideologies."²³ During this phase, Southern courts generally "recognized and accepted the acts and judicial decisions of free states that emancipated visiting slaves."²⁴ Although most Northern states by the 1820s had moved gradually from slavery toward freedom (though hardly equality) for all blacks,²⁵ and although some Northern states limited the time that Southern slaveholders could spend visiting in the North with their slaves,²⁶ "the free states tried to accommodate their slaveholding neighbors who traveled or

22. *Id.* at 51.

23. P. FINKELMAN, *supra* note 6, at 46.

24. *Id.* at 11.

25. In retrospect, one sometimes underestimates how early the Northern states freed their slaves. Vermont's 1777 constitution abolished slavery. *See* VT. CONST. ch. 1, art. I. New Jersey, under its gradual emancipation statutes, still had a few slaves in 1860. *See* State v. Post, 21 N.J.L. 699 (1848); N.J. REV. STAT. tit. xi, ch. 6, § 1 (1846).

26. For example, in the 1780s Pennsylvania established a six-month limitation, while New York provided for a nine-month limitation in 1817. *See* 1780 Pa. Laws ch. 68, § 10; P. FINKELMAN, *supra* note 6, at 46 n.1.

sojourned in the North."²⁷

During the second phase, which stretched from the 1830s into the 1850s,²⁸ accommodation gave way to confrontation. This second phase displayed at least three characteristics. The first pertained to the types of comity issues that produced litigation in Northern courts. In general, four broad situations, other than unlawful flight²⁹ or manumittory intent on the part of the master,³⁰ could explain a slave's presence in a Northern jurisdiction and provide grounds for arguing that the master should be divested of his human property. These were, in diminishing order of duration in a free state or territory: (1) in-migrant residency or domicile; (2) sojourn (nonpermanent presence longer than a visit); (3) visit; and (4) transit. Pre-1830 court cases almost always involved longer-duration issues — for example, when it was reasonable for a court to conclude that an immigrating master had forfeited his human property by falling short of Pennsylvania's statutory registration-of-blacks requirements.³¹ A signal feature of litigation in Northern courts of the 1830s, 1840s and 1850s was the shift towards litigating claims of freedom based on

27. P. FINKELMAN, *supra* note 6, at 11.

28. Finkelman's thesis is ambiguous as to the precise dates of the beginning and ending of the breakdown of comity and as to whether the dates are those of the general political breakdown between the sections or those of judicial decisions. He sometimes seems to perceive the second phase as beginning and/or ending earlier than he does at other times. At one point, for example, he observes that "[o]ne critical but long-overlooked aspect of the federal Union was the system of interstate comity that began to break down as early as the 1820s and was well on the road to self-destruction by the 1840s." *Id.* at 11-12. Finkelman later states:

By 1832 slavery had become a major political issue in the nation. The Missouri crisis of 1820 . . . [and] Nat Turner's rebellion . . . focused national attention on slavery. Yet throughout all of this the state courts of the North maintained their desire for interstate comity and harmony. Only in Pennsylvania was any real attempt made to interfere with the movement of slaves. . . . But in the decade of the 1830s this pattern began to change. Starting in Massachusetts . . . [t]he legal harmony of the nation's first five decades was about to end.

Id. at 99-100. For a useful discussion of Northern judicial and legislative attitudes and slavery rulings, see T. MORRIS, *FREE MEN ALL: THE PERSONAL LIBERTY LAWS OF THE NORTH, 1780-1861* (1974) (focusing not on comity and interstate "voluntary" travel but on attempts to protect blacks from being kidnapped and returned to the South as fugitive slaves). Morris' work accords more closely with the earlier dating than with the later.

In part the ambiguity in dating is inherent in Finkelman's subject matter. But it is greater than it need be because of his text's blurred quality on a critical point — the extent to which judicial decisions merely reflected general political events versus the extent to which the decisions constituted or contributed to those events. His "legal-historical instrumentalism" is, on this point, "soft."

29. Unlawful flight triggered the provisions of the Constitution's fugitive slave clause and the pursuant Fugitive Slave Acts of 1793 and 1850. These are not matters of novel exploration in Finkelman's essay. For such, see S. CAMPBELL, *THE SLAVE CATCHERS: ENFORCEMENT OF THE FUGITIVE SLAVE LAW, 1850-1860* (1970); T. MORRIS, *supra* note 28.

30. There is as yet no published, analytically-satisfactory, exhaustive account of manumission cases "at" the South or "at" the North. *But see* A. Nash, *Negro Rights and Judicial Behavior in the Old South 1-376* (1968) (unpublished dissertation, Harvard University).

31. *See* 1780 Pa. Laws ch. 68, § 5; P. FINKELMAN, *supra* note 6, at 101-80.

much shorter periods of presence in the North — for example, those arising from master-with-accompanying-slave visits or transits.

The second characteristic was a parallel shift in the options that courts exercised in resolving conflict of laws issues.³² The first option was to “grant comity to all visitors, based on a desire to maintain interstate harmony and friendship, even at the expense of local laws and institutions.”³³ The second was to “balance free-state interests against slave-state interests.”³⁴ Option three “was the enforcement of the *lex loci* (law of the state of residence) of the slaves involved.”³⁵ The final option was to “ignore all issues of local policy or conflict of laws theory, by deferring to the United States Constitution.”³⁶ The second phase saw the disappearance of any impulses toward exercising the first option, a diminution of even-handed balancing, and acceptance of the third option in most states.

A third characteristic of the second phase pertained to shifts in substantive doctrines. The first phase had seen occasional confusion as to applicable law and, the rest of the time, judicial rejection of the *Somerset* doctrine, which held that a slave could not be returned to slavery against his will if a master voluntarily brought him to England.³⁷ The second phase saw, first in Massachusetts³⁸ and later in most other Northern states, the acceptance of *Somerset*-like doctrine and rejection of the master’s right even to mere speedy transit with his slave across a free state. That same phase also saw, according to Finkelman, a converse Southern judicial movement away from ear-

32. See P. FINKELMAN, *supra* note 6, at 14-15. Note that the four options are Finkelman’s array. His is not the only way to read the choices available or the propriety of various selections. See generally R. CRAMTON, D. CURRIE & H. KAY, *CONFLICT OF LAWS* 1-145 (3d ed. 1981).

33. P. FINKELMAN, *supra* note 6, at 14.

34. *Id.* at 15.

35. *Id.*

36. *Id.* at 15. This is hardly a parallel to the second and third options. Constitutional deference describes a necessary juridical effort, not an insulatable option. Few judges thought they could put local interests above the Constitution. Rather, their differences involved what the Constitution required on this score.

37. See *Somerset v. Stewart*, 98 Eng. Rep. 499 (1772). Antebellum America generally thought Lord Mansfield to have held that a master’s voluntary bringing of a slave from the West Indies to England freed the slave. Although the actual scope of Mansfield’s opinion has been questioned in recent years, that dispute pertains more to the actual English holding than to the way Americans interpreted it. See generally W. WIECEK, *SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848* (1977); Nadelhaft, *The Somersett Case and Slavery: Myth, Reality, and Repercussions*, 51 J. NEGRO HIST. 193 (1966); Wiecek, *Somerset: Lord Mansfield and the Legitimacy of Slavery in the Anglo-American World*, 42 U. CHI. L. REV. 86 (1974).

38. See *Commonwealth v. Aves*, 35 Mass. (18 Pick.) 193 (1836) (a slave girl brought voluntarily from New Orleans to Massachusetts by her mistress could not be removed to the South again unless she were willing to go).

lier tendencies that had led to a "surprising number of slaves [being] . . . freed by courts in slave states, especially in the period before 1840."³⁹

The third phase, which arrived on the eve of the Civil War, was marked generally by a collapse of comity. According to Finkelman:

In the South freedom suits based on previous free-state residence were, with a few exceptions, virtually impossible to win. Only in Kentucky were blacks still able to vindicate such claims with any degree of consistency. Free blacks were barred from most states in the South, and emancipation was unlawful in many. The rights of free blacks from the North were totally ignored by a number of Southern States.⁴⁰

Finkelman concludes that "[w]e must reject the contention that most of the South continued to recognize the freedom of slaves who were domiciled in the North."⁴¹ Rather, "[w]ell before the secession crisis of 1860-61, the comity provisions of the Constitution were usually ignored when state courts decided cases involving slavery and the rights of free blacks."⁴² Indeed,

[t]he decisions and statutes of northern and southern states indicate that, in some ways, a division of the Union took place before the secession winter of 1860-61. The legal institutions of the free states reflected an antislavery attitude as strong as, and sometimes stronger than, that attitude among the general populace. . . . In the South extreme proslavery advocates were leaders of the bar and bench. Southern courts were willing to give total protection . . . at the expense of free-state laws, the rights of free-state citizens, and interstate comity.⁴³

Thus, even before Lincoln's election a "judicial secession had taken place"⁴⁴ and "the firing on Fort Sumter was only a military manifestation of a judicial and legislative war that had been going on for some time between the States."⁴⁵ The import of Finkelman's argument is that contemporaries perceived the Civil War and Northern victory as rendering impossible a counterfactual future, a phase four in which the Taney Court, dominated by a pro-slave majority, could have extended some of the implications of the *Dred Scott* decision to "nationalizing slavery."⁴⁶

Professor Finkelman tells us a good story with considerable art-

39. P. FINKELMAN, *supra* note 6, at 181.

40. P. FINKELMAN, *supra* note 6, at 285. The reader could correctly observe that "a number" could be anything from one to fifteen in the instant case.

41. *Id.* at 184.

42. *Id.* at 11.

43. *Id.* at 285.

44. *Id.* at 183.

45. *Id.* at 11.

46. *Id.* at 325.

fulness.⁴⁷ At times I found myself close to believing that *An Imperfect Union* is not only good narrative but also entirely true, at least until Finkelman begins his hypothetical account of what the Taney Court might have done during the 1860s in the absence of the Civil War.⁴⁸ But the suspicious reader may detect in the previous passages a reason for second thoughts. Finkelman tells us that the firing on Fort Sumter was "only a military manifestation" of a judicial and legislative war. I should have thought that whatever one might say about the rude shots that arched across Charleston Harbor on April 12 and 13, 1861, one would not say that they were *only* that. I single out these words because they point up an important characteristic of Finkelman's analytic style: overstating or not quite accurately stating something.⁴⁹

C. *Assessing Finkelman's Thesis*

I shall offer an alternate reading of Finkelman's data and urge

47. Finkelman's analysis often displays sensitivity to points that have escaped other scholars. Four such instances occur to me. One is that he notes important cases omitted from H. CATTERALL, *JUDICIAL CASES CONCERNING AMERICAN SLAVERY AND THE NEGRO* (1937), for example, *State v. Laselle*, 1 Blackf. 60 (Ind. 1820) (slavery prohibited in Indiana). See P. FINKELMAN, *supra* note 6, at 93. Second, Finkelman carefully disentangles inaccurate federal reports of *Oliver v. Kauffman*, 18 F. Cas. 657 (C.C.E.D. Pa. 1850) (No. 10,497), *reargued sub nom.* *Oliver v. Weakley*, 18 F. Cas. 678 (C.C.E.D. Pa. 1853) (No. 10,502) (involving enforcement of the federal Fugitive Slave Laws). See P. FINKELMAN, *supra* note 6, at 252 n.42. In a third instance, he highlights a little known but significant fact about the Articles of Confederation debates. Article IV of the Articles of Confederation guaranteed the "free inhabitants" of each state "all privileges and immunities of free citizens in the several States." THE ARTICLES OF CONFEDERATION AND PERPETUAL UNION art. IV. During the debates over adoption of the Articles, South Carolina had moved to insert the word "white" between "free" and "inhabitants." P. FINKELMAN, *supra* note 6, at 31 n.36 (citing D. ROBINSON, *SLAVERY IN THE STRUCTURE OF AMERICAN POLITICS, 1765-1820*, at 153-54 (1971)). Finkelman suggests that if haste was indeed the reason that the word "white" was omitted, "then South Carolina and other Deep South states may have felt no obligation, under the Articles or the Constitution, to grant comity to free blacks from other states." *Id.* Whether sound or not, the suggestion is interesting. Fourth, Finkelman points to the ambiguous wording of the privileges and immunities clause of article IV of the 1787 Constitution, and to the unsettled questions the ambiguity provoked. For example, could a Massachusetts black, venturing into a slave state, demand the right to testify that he would have enjoyed in his home state? Or could a slaveowner, visiting the North and finding himself embroiled in a legal controversy, demand that the testimony of his own slave be excluded? *Id.* at 33-34. That suggestion is, of course, more striking than historically sound.

48. Although I agree with much of James Ely's critique of Finkelman on this score, see Ely, *supra* note 11, at 1759-63, I think Finkelman is to be commended for squarely facing a circumstance that, though suppressed from historical narrative at least since the era of Rankine scientific history, is nonetheless present. Any judgment as to historical responsibility implies a counterfactual possibility. Finkelman's effort at being explicit about the matter is laudable.

49. To use the currently popular "deconstructionist" jargon, *An Imperfect Union* is a "strong reading" of the slavery cases it reads. (See H. BLOOM, *THE BREAKING OF THE VESSELS* (1982), for an example of the deconstructionist jargon.) The question is whether *An Imperfect Union* is also a "headstrong misreading."

that such a reading is at least as plausible as his. Before addressing the question of Southern comity that lies at the heart of Finkelman's narrative, I will suggest that his reading contains certain characteristics that undermine major components of his interpretation and that intimate the wisdom of a less catastrophic reading of the course of antebellum judicial relations between North and South.

The first of these characteristics is Finkelman's tendency to overlook, in certain cases, critical details that would undercut the interpretation that Finkelman offers. This is perhaps a manifestation of Finkelman's general inclination to use a case to support some generalization that he wishes to establish, even when the best reading of the case does not offer such support. Combined with his geographical selectivity in sampling cases,⁵⁰ these failings cast doubt on some of the major generalizations that Finkelman defends. More broadly, Finkelman gives insufficient consideration to the question of law as a dependent variable versus law as an internally evolving entity. He sometimes classifies decisions dichotomously on the basis of insufficiently documented assertions about judicial aims — for example, and somewhat simplistically, as responding to the conflict of laws issues raised by slavery *either* with "automatic comity" *or* with judicial "war-making." In evaluating decisions, Finkelman tends to erect antinomies, that is, "good law" versus "bad law", or even, "non-law." In the next subsection I will attempt to detail some of these tendencies.⁵¹ Although these failings by no means eliminate my respect for Finkelman's intellectual effort, their presence affects the convincingness of some of its chief generalizations.

1. *Interpretation of Vermont and New Jersey Cases*

Finkelman must first establish that harmony prevailed in phase one. I do not totally disagree with him on this score. But I confess to being disconcerted at his treatment of some of the case evidence on the way to establishing his contention. Let us consider his treatment, first, of *Selectmen of Windsor v. Jacob*,⁵² the single early nineteenth century Vermont case that he finds relevant to comity, and, second,

50. See Part I-D *infra*.

51. Full discussion of all of these characteristics is not feasible within the confines of this essay. Particularly note that I do not here challenge in any detail an arguable assumption at the base of Finkelman's comity argument: the notion that the only "correct" solutions to the conflict of laws problems involved had to weigh heavily the policy interests expressed in the *lex loci*. Modern conflict of laws analysis might well cavil at the assumption. See generally R. CRAMTON, D. CURRIE & H. KAY, *supra* note 32, at 201-309 (1981).

52. 2 Tyl. 192 (Vt. 1802).

of *State v. Quick*,⁵³ an 1807 New Jersey case that Finkelman thinks "indicates a certain bias"⁵⁴ in the New Jersey court for not granting comity when it could well have been granted. Finkelman has this to say about the Vermont case:

The . . . case . . . indicates the attitude of the Vermont Supreme Court toward slavery and comity. In 1802 the Board of Selectmen of the Town of Windsor sued Stephen Jacob for the maintenance of an "infirm, sick, and blind" black woman, whom Jacob allegedly purchased as a slave in 1793 and later abandoned. All parties in the case agreed slavery could not legally exist in Vermont. But counsel for Windsor claimed that a *de facto* slavery existed before Jacob abandoned the woman and thus he was responsible for her care. The state supreme court had to decide if the bill of sale from the 1793 purchase was admissible as evidence against Jacob. Without the bill . . . the case . . . would dissolve.

Judge Royal [*sic*] Tyler ruled that the bill of sale was not valid in Vermont, because the state's constitution was 'express' and 'no inhabitant' could 'hold a slave' in the state. Thus Jacob was not liable for the upkeep of the old woman. [Slaves entering Vermont became free unless they were fugitives.] Tyler asserted that the "good people of Vermont" would submit "with cheerfulness" to the enforcement of the Fugitive Slave Law, even though they might wish that the federal requirements were "more congenial to our modes of thinking." In the spirit of comity and nationalism that pervaded this period, Judge Tyler declared that Vermonters were "sensible . . . of numerous right blessings to us as individuals, and to the State as an integral of the Union."⁵⁵

I have quoted at some length because I want the reader first to form in her or his mind a clear image of what (going by Finkelman's description) she or he thinks the case is about, and then to ask whether the generalization about "the spirit of comity" follows from that image. Doesn't the description conjure up something like: (1) a miscreant Vermonter, one Jacob, who purchases a slave in 1793, (ab)uses her for a while, then turns her out to starve when she is old and feeble; and (2) some high-minded Town Selectmen who want to require the miscreant Jacob to do the "decent slaveowner's thing" — support her in old age and infirmity? However, Jacob escapes his rightful burden because the 1793 bill of sale was never valid under Vermont law. Then, ignoring the resulting pitiful welfare situation, Finkelman winds up on a "congenial" note of interpretation regarding the attitudes of the Vermont Supreme Court.

There are two problems here. One has to do with getting the

53. 2 N.J.L. 393 (1807).

54. P. FINKELMAN, *supra* note 6, at 76-77.

55. *Id.* at 78-79.

facts of the case straight. The other has to do with their appropriate interpretation.

As to facts, my going to the Vermont Reports and reading the case was triggered by a mere typographic suspicion, a dim recollection that Chief Judge Tyler spelled his first name differently than Finkelman spelled it in his text — a suspicion that turned out to be well-founded.⁵⁶ A reading of the case also revealed that the bill of sale was dated 1783, not 1793 — three years before rather than seven years after the passage of a 1786 state law prohibiting the export of slaves from the state.⁵⁷

Reading further disclosed that the miscreant Jacob's account of what had happened and what the Selectmen were up to was rather different from Finkelman's. According to Jacob's counsel, certain inhabitants of Windsor had "inveigled . . . [the black woman] from her master's family [Jacob's family] and service by the syren [*sic*] songs of *liberty and equality*"⁵⁸ She went off and worked for them, while he, miscreant Jacob, "did not attempt . . . to reclaim her. As an inhabitant of the state, in obedience to the constitution, he considered that he could not hold her as a slave."⁵⁹

There is one final, interesting aspect of the case that Finkelman doesn't bother to tell us. It is that Jacob was himself a colleague of Royall Tyler on the Vermont Supreme Court. *Judge* Jacob excused himself from participating in the case for obvious reasons.⁶⁰ Why doesn't Finkelman tell us this? Surely Judge Jacob's involvement has some bearing on interpreting the case's outcome as an indicator of the attitudes of the Vermont Supreme Court.

As to the interpretation of Judge Jacob's case, what does the substantive situation and the case holding really indicate about comity? Does it say anything at all about the issues that later were so to arouse Southerners — whether they could sojourn, visit, or even transit without losing their slaves? Given that Jacob was off the case and apparently had not attempted to prevent the black woman's departure (surely he was not seeking to inveigle her west and south to some new promised land of slavery across the wide Missouri), what real test of comity was there? And this, after all, is the only Vermont example given.

56. Judge Tyler's first name was "Royall," not "Royal."

57. See *Selectmen of Windsor v. Jacob*, 2 Tyl. at 192, 193.

58. 2 Tyl. at 196-97.

59. 2 Tyl. at 197.

60. 2 Tyl. at 198.

Now let us consider the New Jersey case, *State v. Quick*.⁶¹ Finkelman seems to be considerably less admiring of New Jersey's record of protecting an "unlimited right of transit and sojourn for non-resident slaveowners and their human 'property' . . . until 1865"⁶² than he is of Vermont's. At any rate, he says of *Quick*:

Because New Jersey protected the rights of slaveowners only one case dealing with the problem of comity and slavery was recorded. *State v. Quick* (1807) involved a slave purchased in New York and brought to New Jersey. The case was a classic problem in the choice of laws. New York prohibited the selling of a slave for export. New Jersey, on the other hand, had no objection to the introduction of new slaves, provided they were purchased outside the state and not resold within the state. There was no New Jersey law that could free the slave. In reaching his decision, Justice William Pennington noted that if the slave was free under New York law, "it must be that he was free before he was brought into this State; for . . . New York cannot extend into this State and attach itself to any act done here, in order to give him freedom."⁶³

So much for what Pennington ruled. As to what Finkelman thinks Pennington might have done, "Pennington could have determined that under New York law the slave was free before he came to New Jersey, because the *intent* to export a slave purchased in the state was an offense, as well as the actual exportation"⁶⁴ and that "since the exportation began with preparations in New York, the crime against New York law was committed *before* the slave ever reached New Jersey."⁶⁵ But Pennington rendered no such interpretation.

Instead he ruled that the slave would be free under New York law only if the original purchase of the slave was made with the intent of illegally exporting the slave from New York. Since the purchase took place two years prior to the removal, Pennington held that the purchase had not been an attempt to evade the New York law; thus the slave was not freed.⁶⁶

Finkelman's moral is that the decision "indicates a certain bias. . . . Unlike other northern states that leaned toward liberty while at the same time granting rights to nonresidents, New Jersey gave rights to all slaveowners and refused to enforce a New York law for the benefit of a slave owned by a New Jersey resident."⁶⁷ Thus, according to Finkelman, "State v. Quick and the protection offered slaves in

61. 2 N.J.L. 393 (1807).

62. P. FINKELMAN, *supra* note 6, at 76.

63. *Id.* at 76-77 (footnote omitted).

64. *Id.* at 77 (emphasis in original).

65. *Id.* (emphasis in original).

66. *Id.*

67. *Id.*

transit . . . indicate that New Jersey was one of the least pro-free-dom states in the North.”⁶⁸

Now, let us picture to ourselves, drawing from Finkelman’s narrative, what has been going on. Does it seem that the New Jersey judges didn’t do what they really ought to have done — free the slave by applying New York law in the spirit of comity against the New Jersey resident who exported the slave from New York? Particularly, don’t you get the impression that this is a New Jersey Supreme Court case? The book itself clearly gives that impression — given that the case is embedded between discussions of New York and New England appellate cases, and given that Finkelman treats the result as indicative of the stand on comity of the whole state of New Jersey. Yet *Quick* was not a state supreme court case at all. Rather, it was a case in the Bergen, New Jersey circuit decided by one judge.

Further, doesn’t one get the impression that “Quick” must be either the slave seeking freedom or his owner, and that the owner is the exporter from New York and importer into New Jersey? Doesn’t one get the sense that since the owner has been so naughty in avoiding the intent of the New York statute it would serve him right to lose the slave? Lastly, is it not obvious from Finkelman’s exposition that the core of his objection to Judge Pennington’s opinion is that the judge ignored the “appropriate” comity implications of the second of the New York law’s described offenses — one offense being *exporting* a slave purchased in New York and the other offense being *intending to export* a slave purchased in New York?

In fact, Dick was the slave and Quick, his owner, was several sales removed from the erring exporter/importer. The exporting/importing had not been a recent occurrence. The supposedly offensive New York purchase of the slave Dick had taken place not two years, but rather some twelve or thirteen years before the trial in New Jersey. The New York purchaser was one Sir James Jay who, from a time prior to the purchase, had been accustomed to splitting his time between residing in New York and residing on his Bergen County, New Jersey plantation. At some point after purchasing the slave Dick, Sir James had sent him from Sir James’ New York house to his New Jersey farm. The alert reader will note that this circumstance is not first cousin, let alone identical twin, to the kind of New-York-law-evading action that Finkelman’s narrative contemplates. At some time after sending the slave from his New York to his New

68. *Id.* at n.27.

Jersey property, seemingly about two years, Sir James committed Dick to jail for what the defense lawyer described as "bad behavior."⁶⁹ Sir James later "sold him out of it" to get rid of him as troublesome.⁷⁰ The slave "passed through the hands of several masters, when at length the defendant bought him."⁷¹

If that account of the events, which is the best I can piece together, is correct, it does not provide evidence of any wicked exporter/importer behavior contravening New York law — even the version of the New York law that Finkelman has given us. The case simply does not establish any intent to export from New York at the time of Sir James' (not Quick's) purchase of Dick.

Moreover, Finkelman reads the New York law as penalizing a person who purchases a New York slave with the intent to export. I put the best gloss possible on Finkelman's prose which, read literally, states that the New York statute sought to punish intent to export *without* any act. What *did* the New York law say? According to the New Jersey Court Report, it penalized anyone who "shall, at any time, purchase or buy, or . . . take or receive any slave, *with intent* to remove, export, or carry such slave . . . to any other place without the State and there to be sold."⁷² The slave, as I (and Judge Pennington) read the New York statute, was to go free if "Sir James, immediately on purchasing him, had brought him into [New Jersey], and sold him."⁷³ But, if anything at all is plain about the case, it is that neither Sir James nor the not-so-fast Mr. Quick had such an intent.

To reach this conclusion is to observe a possible cause 'of Finkelman's analytic slip and to suggest a problem of authorial attitude that bedevils much of *An Imperfect Union*. Pushing the case facts around, Finkelman seeks to open up a hole toward freedom. Then he blames the court in question for not leading the slave through the illusory hole he creates. On any objective analysis, the circumstances of Quick's case and the New York law as stated in the New Jersey Reports require the result that Judge Pennington reached. Finkelman's interpretations of *Jacob* and *Quick* are not the only "strong readings" — or, as I would put it, "headstrong misreadings" — that occur in *An Imperfect Union*.⁷⁴

69. 2 N.J.L. at 394.

70. 2 N.J.L. at 394.

71. 2 N.J.L. at 393.

72. 2 N.J.L. at 394.

73. 2 N.J.L. at 395.

74. Space does not permit instancing all the cases where I think it at least arguable that

2. Judicial Motivation and Attitudes

Finkelman's moral sensibilities, joined with his radical "instrumentalist" tendency to treat lines of case outcomes as dependent variables of political inputs, lead him to explain variations among the states of a single section in ways that I find less than compelling. I shall take just a few examples by way of illustration.

a. Variation from *Aves*. One variation in outcomes among Northern jurisdictions is that the State Supreme Courts of Illinois, Indiana, and New Jersey did not decide to follow *Commonwealth v. Aves*⁷⁵ when similar cases came before them.⁷⁶ Finkelman "explains" these decisions by observing that all three states had weak antislavery movements, major borders with slave states, and were Negrophobic Democratic strongholds.⁷⁷ Putative statewide political and geographic characteristics turn themselves into direct determinants of case decisions. Finkelman's explanation is not made more satisfactory by relegating to a footnote⁷⁸ the State of California — a jurisdiction that also rejected *Aves*⁷⁹ but did not share similar geopolitical characteristics.

b. Judicial motivations or reasoning. Finkelman sometimes has difficulty with judicial motivations or reasoning, occasionally reach-

Finkelman's reading is either wrong or leaves out something. Instances include the following, however. With respect to *Lewis v. Fullerton*, 22 Va. (1 Rand.) 15 (1821), a case that Finkelman describes as an unfortunate inveigling of slaves to return from Ohio to Virginia, see P. FINKELMAN, *supra* note 6, at 89, two alternate readings of the case are already in circulation. At least one is more plausible than Finkelman's. He ignores both. Compare R. COVER, JUSTICE ACCUSED 95-98 (1975), with Nash, *Reason of Slavery*, *supra* note 11, at 134. With respect to *Ex parte Bushnell*, 9 Ohio St. 77 (1851), Finkelman uses the case to show that the Ohio court remained "antislavery until the Civil War" but omits telling us that the court split closely, 3-2, on the case. Perhaps the most egregious "strong misreading" is his version of John Marshall's opinion in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 82 (1821). The case now is best remembered for Marshall's lengthy defense of the United States Supreme Court's jurisdiction in the case notwithstanding the eleventh amendment and the attacks of the Virginia Court of Appeals. But there is a second part to it — namely, whether the defendants could be punished by the State of Virginia for selling in Virginia, contrary to state law, federal lottery tickets putatively authorized by a District of Columbia lottery commission. Considering the case as one of many relating to the possibility of Northern and Southern courts denying right of passage to slaves notwithstanding the commerce clause, Finkelman states, "in *Cohens* . . . the court had upheld a Virginia prohibition on the sale of lottery tickets, even though the lottery had been authorized by Congress." P. FINKELMAN, *supra* note 6, at 260 n.60. He makes it seem as if *Cohens* endorsed a state's right to regulate interstate commerce against congressional will. But Marshall's opinion held no such thing. Rather, it allowed Virginia to prosecute a Norfolk sale explicitly on the ground that Congress intended to authorize the sale of lottery tickets *only* within the District of Columbia. 19 U.S. (6 Wheat.) at 119.

75. 35 Mass. (18 Pick.) 193 (1836).

76. See P. FINKELMAN, *supra* note 6, at 127.

77. See *id.*

78. *Id.* at 127 n.4.

79. See *Ex parte Archy*, 9 Cal. 147 (1858).

ing conclusions without any buttressing evidence. Thus, at a crucial juncture in the book's argument, he asserts of Southern judicial motivations: "[F]idelity to the law itself may go a long way in explaining why the courts in a number of Southern states were willing to liberate slaves who had lived in free states. It was not sympathy for blacks nor a desire to end slavery that led to these decisions."⁸⁰ Given the number of occasions on which Southern judges did express something much like sympathy for blacks,⁸¹ this sweeping conclusion is not well supported. At other times Finkelman has difficulty believing evidence when, arguably, the difficulty lies in his own mind-set. Thus, of a Kentucky case, *Carney v. Hampton*,⁸² which involved the same New York anti-exportation-to-sell statute as *State v. Quick*,⁸³ he observes:

[T]he Kentucky Supreme Court refused to enforce New York's prohibition against selling slaves and removing them from the State. The Kentucky court would not "believe" that New York "intended wholly to prevent the exportation of slaves" and thus ruled that a man who had purchased a slave without any intention to export him and then later left that state had not in fact violated New York's law. Kentucky's inability to "believe" that New York could truly mean to end *all* exportation of slaves indicates how difficult it was for states to grant comity to each other's laws. In this case New York's interests were so alien to those of Kentucky that the latter state simply found it impossible to understand New York's law.⁸⁴

Here is palpable confusion. First, the New York law prohibited purchasing-and-exporting, *not* selling-and-exporting. Once you sell, the sold "object" is difficult to remove from the state — it's no longer yours. Second, the Kentucky court's discussion of the various exceptions to the law⁸⁵ makes plain the fact that New York did not intend to forbid *all* exportation. Third, because a neutral reading of the New York statute indicates that it is a prohibition against *purchase-with-intent-to-sell-out-of-state*,⁸⁶ it is hard to resist the conclusion

80. P. FINKELMAN, *supra* note 6, at 182.

81. See generally Nash, *Fairness and Formalism in the Trials of Blacks in the State Supreme Courts of the Old South*, 56 VA. L. REV. 64 (1970); Nash, *Negro Rights, Unionism, and Greatness on the South Carolina Court of Appeals: The Extraordinary Chief Justice John Belton O'Neill*, 21 S.C. L. REV. 141 (1969).

82. 19 Ky. (3 T.B. Mon.) 228 (1826).

83. 2 N.J.L. 393 (1807); see notes 61-63 *supra* and accompanying text.

84. P. FINKELMAN, *supra* note 6, at 71.

85. Exceptions included, for example, taking one's own slaves from New York to settle in another jurisdiction and inheritance of slaves by a non-New Yorker who removed them without intent to sell. *Carney v. Hampton*, 19 Ky. (3 T.B. Mon.) 228, 230 (1826).

86. See note 72 *supra* and accompanying text.

that Finkelman, not Kentucky, "simply found it impossible to understand New York's law" because *his* perspectives are so "alien."

Finally, a neutral reading of *Carney v. Hampton* indicates that the Kentucky court did a passable job of observing comity. Finkelman fails to tell the reader that the lower court's finding for the defendant slave owner was "reversed . . . and the cause . . . remanded for new proceedings"⁸⁷ because the lower court erred by instructing the jury to find for the slaveowner and against the claimant slave if it believed that the purchaser-and-exporter of the plaintiff's mother "did not sell her, but gave her to his daughter."⁸⁸ The Kentucky Supreme Court said that the instruction was improper because it overlooked the fact that a change of heart after exportation and a pursuant decision not to sell (but rather to keep or give) would not bar the slave's right to claim freedom. That right accrued once there had been purchase-with-intent-to-export and could not be abridged by later change of intent.⁸⁹ Thus, the Kentucky Court surely did not in this case show a complete inability to understand or to observe comity.

Arguably, Finkelman's understanding goes astray on a number of other occasions for like reasons — for example, when he finds it difficult to credit that not only in the North but also in the South there might be a difference between a state's legislature and its appeals court on some slavery issue, that there might be something less than complete and intense pro-slavery unity. Another instance is when he discounts as an example of anti-abolition sentiment an Illinois Senator's observation in the United States Senate that, until the late 1840s, "the courts of the slave States had been much more liberal in their adjudications upon the question of slavery than the free States."⁹⁰ So too, he seems to wear analytic blinders when he conclusively characterizes as anti-abolitionist a New York judge who, following his understanding of New York law, first freed slaves in transit with their master and mistress from Virginia through New York City to Texas, and then gave money to the cause of the suddenly impecunious master and mistress.

87. 19 Ky. (3 T.B. Mon.) at 233.

88. 19 Ky. (3 T.B. Mon.) at 229.

89. 19 Ky. (3 T.B. Mon.) at 229.

90. P. FINKELMAN, *supra* note 6, at 99. Compare *id.* at 99 & n.101 (where Finkelman feels compelled to qualify and explain the statement quoted in text), with *id.* at 150-55 (where Finkelman has no difficulty perceiving an attitudinal split between the Illinois legislature and the Illinois Supreme Court). Finkelman's book also omits discussion of almost all of the instances of similar legislative/judicial splits in attitudes and manumission policy in the Southern states.

There is no point in belaboring these sorts of arguable interpretations, but they do illustrate how Finkelman's argument can push beyond the evidence he offers to support it. This in mind, I turn to the issue most vital to the overall success of Finkelman's argument — the collapse of comity during the phase immediately preceding the Civil War.

D. *Sampling and the Question of a Collapse of Southern Comity — Finkelman's Problematic Generalizations and the Evidence*

At the heart of *An Imperfect Union* is the contention that during the 1840s and 1850s judicial matters went seriously awry in the North and South. I will put aside whether Finkelman is right or wrong about Northern judicial decisions and concentrate on ten of his core generalizations about the Southern judiciaries. I shall argue that only one of these ten is unexceptionable, and that the others are variously false, simplistic or otherwise problematic, as follows:

(1) "The development of . . . doctrine in the American South is best illustrated by an examination of the case law in four slave states: Kentucky, Louisiana, Missouri, and Mississippi."⁹¹ (False)

(2) "[S]outhern courts, gradually at first and then almost in unison, began to deny comity to blacks who had lived in the North, where they had gained their liberty."⁹² (False)

(3) "By 1860 . . . most Southern states refused to recognize or uphold freedom based on free state residence or sojourn, or even direct emancipation in a free state."⁹³ (False)

(4) "[F]idelity to law — this impartiality of decisionmaking — began to fade in the 1830s and disappeared throughout most of the South before 1860. By then fidelity to the institution of slavery was more important than fidelity to abstract concepts of law."⁹⁴ (Simplistic)

(5) "Slave-state courts reflected the attitudes of the people they served. . . ."⁹⁵ (Simplistic)

(6) "Kentucky and a few other slave states continued to recognize freedom claims based on the laws of other states throughout the antebellum period. But even in these liberal states the trend was moving away from decisions in favor of liberty."⁹⁶ (Unexceptionable, in respect to Kentucky)

(7) "By the 1850s most of the South had, to one degree or another, decided that interstate comity could not extend to cases involving

91. *Id.* at 187.

92. *Id.* at 179.

93. *Id.* at 11.

94. *Id.* at 182.

95. *Id.* at 234.

96. *Id.* at 189.

slaves who claimed to be free."⁹⁷ (Muddy — either trivially true or wrong)

(8) "It would be convenient . . . to argue that southern courts ceased granting comity . . . in response to northern decisions denying comity to slaveowners in transit. . . . [I]t is not at all clear that the change came about in this way."⁹⁸ (Problematic)

(9) "[S]outhern courts freed slaves who had spent time in the North well *before* northern courts freed slaves in transit. It surely would be absurd to argue that southern jurists reversed their own precedents because northern jurists had endorsed them."⁹⁹ (Confused)

(10) "Within the realm of state action *Lemmon* [a New York case] represents the final development in the law of freedom, while *Mitchell* [a Mississippi case] symbolized the ultimate logic of the law of bondage." Finkelman concludes that what the dissenting judge in *Lemmon*, and the judge in *Mitchell* "sensed, but could not admit, was that the legal systems of the North and South could no longer coexist."¹⁰⁰ (Problematic)

1. Finkelman's False Generalizations

Perhaps the most curious generalization in *An Imperfect Union* is the assertion that the development of legal doctrine concerning slavery in the American South is best illustrated by examining case law in Kentucky, Louisiana, Missouri, and Mississippi.¹⁰¹ A moment's thought suggests that the best way of illustrating the development of Southern slavery case law is to examine it in all fifteen slave states, or at least in all eleven of the secession states. Complete enumeration simply is better than sampling, especially when the "universe" is so small and its component members, the states, are so likely to diverge in ways that no sampling technique can control.

Moreover, given a decision to sample rather than to consider all the slave state jurisdictions, the combination of states chosen — surely not a random selection on Finkelman's part — contains two characteristics which suggest that they might make a singularly unrepresentative "quad." One characteristic is that Finkelman's sample contains a greater percentage of nonseceding than seceding slave states.¹⁰² A second characteristic is that all of the sample states border the Mississippi River. None is east of the Appalachians; thus,

97. *Id.* at 189-90.

98. *Id.* at 182-83.

99. *Id.* at 183.

100. *Id.* at 310.

101. P. FINKELMAN, *supra* note 6, at 187.

102. Of the four that did not withdraw from the Union (four states, incidentally, that contained a very small minority of the Union's slaves), Finkelman selects two, or 50%. Of the 11 states that did withdraw, Professor Finkelman also picks two, or 18%.

none is one of the original thirteen colonies. None is one of the older slave-holding jurisdictions. To the extent that jurisprudential characteristics vary accordingly, Finkelman's sample will not detect the variance. His selection is roughly equivalent to a Northern sample consisting of Iowa, Illinois, Wisconsin, and the Minnesota Territory. These states might fairly represent the Northern Mississippi Valley but, absent any New England or North Atlantic states, would be manifestly unreliable as an "all-Northern" sample.

Finkelman's sampling apparently leads him to believe two of his other crucial, but incorrect, assertions: that Southern courts began to deny comity to blacks who had gained liberty in the North "gradually at first and then almost in unison"¹⁰³ and the closely related assertion that by 1860 "most" Southern states rejected claims of freedom based on "free-state residence or sojourn, or even direct emancipation in a free state."¹⁰⁴ Although indeed related, the two assertions are not entirely four-square with each other as to the number of Southern states denying comity and as to subjects covered in the comity denials. The second generalization tells us only that "most" states did so — which presumably means *either* six or more of the seceding states *or* eight or more of the slave-holding states. The first generalization claims more — that the denial was almost unanimous by the eve of the Civil War. It also seems to make a stronger claim as to the subjects covered — and a counter-intuitive one at that. Where the second generalization has *most* Southern states rejecting claims in *several* circumstances — free state emancipation, free state residence and free state sojourn — the first describes an almost unanimous denial of claims based on the strongest "pro-freedom" situations, where (ex-)slaves had actually gained liberty by judicial action in the North. This is a bit odd, unless we try an unusual and very awkward reading of Finkelman's first generalization by taking it to mean that although Southern courts nearly unanimously *did begin* to deny comity, they *did not finish* so doing.

A glance at relevant cases in the jurisdictions that Finkelman omits entirely or handles insufficiently in stray footnotes will show that, in any event, both generalizations are false. The only way that one can come close to counting a majority of Southern state jurisdictions as denying comity during the period from 1855-1860 is if one includes as "failing to grant comity" courts to whom no such cases were appealed during those years.

103. P. FINKELMAN, *supra* note 6, at 179.

104. *Id.* at 11.

If part of Finkelman's counting trouble is caused by his peculiar sampling, much of the rest results because he isolates what one might call the explicit conflict-of-laws/comity cases, with which he does deal, from the implicit conflict-of-laws/comity cases,¹⁰⁵ with which he deals little or not at all. Yet implicit comity cases involved judges in allied issues whose disposition should (especially in the absence of more explicit conflict-of-laws cases on the relevant dockets) be indicative if not dispositive of whether or not the court in question was bent on an "anti-comity" warlike judicial course.

Whatever the merits of this objection to Finkelman's thesis,¹⁰⁶ let us for the moment examine the disposition of the last few important antebellum cases raising comity issues in each slave state's appellate court. To give every advantage to Finkelman's thesis, we shall say that it succeeds if *either* a bare majority (six) of the seceding states *or* a bare majority (eight) of all of the slave states can be shown to have denied comity as a general late antebellum practice. We shall also give Finkelman's thesis a leg up by counting the box-score of his four sample states as he does: one remaining on the whole disinclined to wage judicial war on comity (Kentucky), and three moving to an anti-comity position (Mississippi, Missouri, and Louisiana).¹⁰⁷ Finkelman's thesis thus produces: (1) a score of zero for and two against comity among the seceding jurisdictions; and (2) a score of one for to three against among all the slaveholding jurisdictions. What happens if we now add in the states Finkelman doesn't sample?

Let us take the two omitted border states, Maryland and Delaware, first. The fruits of my research do not help Finkelman's "off to war" thesis. With respect to the Delaware Supreme Court, I cannot find any cases that explicitly or implicitly deny the efficacy of other states' laws in conferring the benefits of freedom. Indeed, the laws of Delaware aimed at the opposite result. An act of 1787 freed slaves imported into Delaware "for sale, or otherwise."¹⁰⁸ A 1793 act outlawed both kidnapping free blacks into slavery and exporting slaves for sale without a license.¹⁰⁹ Early judicial decisions favored the

105. For example, those involving wills that directed out-of-state manumission of slaves in instances where the estate was saddled with in-state debts, or wills that permitted slaves to choose between Northern freedom and Southern slavery.

106. I have on an earlier occasion dealt with the dispositions of some thirteen manumission and comity-related issues in five Southern jurisdictions, and shall not repeat the entire demonstration here. See Nash, *Reason of Slavery*, *supra* note 11, at 200-02.

107. There is room for argument about the import of the Louisiana court's holdings, but I shall not develop the point here for reasons of space.

108. Act of Feb. 3, 1787, ch. 145 b, § 7, 2 Del. Laws 884, 886-87.

109. Act of June 14, 1793, ch. 22 c, 2 Del. Laws 1093.

slave. In *Negro Guy v. Hutchins*,¹¹⁰ a master who had merely brought his slave into Delaware with a cartload of wheat seed to sow on his Delaware farm lost his black to liberty. In *Negro Abram v. Burrows*,¹¹¹ a Maryland master sent a slave, Negro Abram, to work one week for the master's brother, who was a tenant on the master's Delaware farm, some three miles distant from the master's Maryland residence. So doing, the master lost his property in Abram forever. Later Delaware decisions ran in the same direction.¹¹² Maryland had much more slavery than Delaware although Maryland's slavery docket was by no means comparable to those of states such as North Carolina, Tennessee, or Louisiana. Although space limitations render impractical a complete analysis of the Maryland decisions, brief examination of the five Maryland Court of Appeals cases that arose during the 1850s and have some bearing upon matters of comity do not buttress Finkelman's generalizations. Of these five cases, only one — *Northern Central Railway v. Scholl*¹¹³ — goes off in an "anti-freedom direction." But one must push the analysis very hard to argue that the holding in *Northern Central Railway* indicates a reprehensible flouting of comity. The question was whether a railroad was liable in Maryland courts for the carelessness of one of its ticket agents in selling in Pennsylvania a ticket to a runaway Maryland slave notwithstanding a warning to the ticket agent by a third party that the black had unlawfully absconded from his Maryland master.¹¹⁴ In the view of Maryland Chief Justice Le Grand, Pennsylvania might "forbid its courts to grant redress for the wrong, but it cannot oust the jurisdiction of the courts of the State of the injured party . . . [w]henver the wrong-doer comes within [that State's] limits."¹¹⁵ Thus, the Court of Appeals of Maryland applied the law of the forum and the law of the locus of residence though not of the locus of the ticket sale. Any doubts that the Maryland court's han-

110. Unreported case, cited in *Thoroughgood v. Anderson*, 5 Del. (5 Harr.) 97, 103-04 n.a., *affd.*, 5 Del. (5 Harr.) 199 (1848). *Thoroughgood* draws on a judge's notebook of earlier cases. Although the notebook is reprinted in *DELAWARE CASES*, neither *Negro Guy* nor *Negro Abram*, see text at note 111 *infra*, appears there.

111. Unreported case, cited in *Thoroughgood v. Anderson*, 5 Del. (5 Harr.) 97, 102-03 n.a., *affd.*, 5 Del. (5 Harr.) 199 (1848).

112. For example, in *State v. Dillahun*, 3 Del. (3 Harr.) 551 (1840), and *State v. Jeans*, 4 Del. (4 Harr.) 570 (1845), the Delaware Court found a presumption that, at least for the purpose of being a witness, Negroes were not slaves, but free.

113. 16 Md. 331 (1860). On the question of whether Southern slavery decisions could be meaningfully pro- or anti-slavery, see Nash, *Reason of Slavery*, *supra* note 11, at 156-72.

114. There was contradictory testimony as to whether the warning immediately preceded or immediately followed the sale. 16 Md. at 347. The Maryland court treats the case as if the priority of the warning had been demonstrated. 16 Md. at 349.

115. 16 Md. at 351.

dling of the case might cause are not borne out by the resolutions of the other four Maryland cases. In *Brown v. Brown*,¹¹⁶ the 1858 Maryland court took an approach to a bequest of freedom that surely would have failed before a judiciary hostile to such grants. *Brown v. Brown* upheld a will with several provisions each of which would probably have been voided by the Georgia or post-1859 Mississippi benches. One provision granted freedom after varying terms of years during which the slaves were to be hired out. During that time they would have been *statu liberi* with a quasi-free status — precisely the status that Southern extremist judges feared would provide bad, envy-inducing examples to other less favored slaves. Another provision of the will required that the testator's plantation be rented out with the annual proceeds to be spent on the welfare of his blacks. That is not the sort of practice that would have commended itself to Judge Harris of Mississippi and *Mitchell v. Wells*¹¹⁷ fame.

An 1853 case, *Ringgold v. Barley*,¹¹⁸ found the Maryland court holding — in contrast to an earlier case¹¹⁹ — that a master who had taken his Maryland slaves with him to Missouri to establish a farm and who farmed there for approximately a year before becoming ill and returning to Maryland, lost his slaves on bringing them back with him. That is not the sort of ruling that would have commended itself to a pro-slavery judge seeking loopholes in the law of domicile to benefit the master. Furthermore, in *Alexander v. Worthington*,¹²⁰ Judge Le Grand observed:

To permit the heirs at law who have availed themselves of their proximity in blood to obtain administration on the personal estate of the testator, to sell the negroes into ceaseless bondage in foreign climes, for the purpose of providing for payment of debts which are justly chargeable on the lands descended to the heirs at law, . . . would seem to be an act of injustice of which a court composed of slaveholders . . . could not possibly be guilty.¹²¹

116. 12 Md. 87 (1858).

117. 37 Miss. 235 (1859); see notes 126-30 *infra* and accompanying text.

118. 5 Md. 186 (1853).

119. The earlier case was *Cross v. Black*, 9 G. & J. 198 (Md. 1837), which held that time spent in Ohio during an abortive trip to Missouri did not, in conjunction with a relevant Maryland statute of 1831, operate to divest the master of his property in slaves on return to Maryland. The court reached this result despite the fact that the master had signed deeds of manumission while in Ohio. Although I can imagine Finkelman arguing that this case showed the 1837 Maryland court's disregard for comity with Ohio, the evidence showed fairly clearly that a large Ohio anti-slavery crowd had intimidated the master into executing the manumit-tory devices. See 9 G. & J. at 206.

120. 5 Md. 471 (1854).

121. 5 Md. at 494.

In *Smith v. Smith*,¹²² decided in the same year, the sale of a *statu liberi* out of Maryland in frustration of a bequest of freedom caused the Chief Justice to express in dictum "our condemnation of the contrivance, by whoever made, to deprive a helpless negress of the freedom to which she was entitled by her master's will. Such conduct . . . ought to be visited with the severest penalties of the criminal law."¹²³

Whether mere words or tell-tales of judicial attitudes, these passages in *Alexander* and *Smith*, in conjunction with the other cases discussed, indicate that Maryland should not be included in the "warlike" comity-denying "camp" of Mississippi and Missouri. Thus, we find that the relevant decisions of three of the four non-seceding slaveholding states — two of which Finkelman dealt with and two of which he ignored — do not support Finkelman's hypothesis. Considering the South as a whole, we now have a tie of three in favor of comity (Kentucky, Delaware, and Maryland) to three against (Mississippi, Louisiana, and Missouri).

What happens if we examine the records of the slave states that did secede? Will we find in the comparison that the Maryland and Delaware results are atypical, border-state phenomena? The answer is a reasonably clear "No." Indeed, if there is any real puzzle it is that Finkelman could have thought his sample representative. That is because abundant evidence contrary to his hypothesis already exists in other historical analyses for at least four of these nonborder states: Texas, Tennessee, and the two Carolinas.

Texas can be dealt with by quoting a relevant paragraph from my 1971 article:

Between 1845 and 1860, the Texas judges were asked to rule on six issues which afforded them ample room to determine either for or against liberty: whether a will seeking to free blacks and remove them from the state was valid, when Texas law forbade domestic liberation; whether slaves could make a legally cognizable choice between freedom and slavery; *whether interstate comity required Texas to apply another jurisdiction's "pro-freedom" laws*; whether a slave could obtain not only freedom but also monetary damages for unlawful detention; whether a free black had the right to rescind an agreement selling himself into slavery; and whether oral, as distinct from written, gifts of freedom were valid. On all six issues the Texas judges aligned themselves with the "libertarians."¹²⁴

Texas ought to have been reckoned with in a manner more adequate

122. 6 Md. 496 (1854).

123. 6 Md. at 500.

124. Nash, *Trial Rights of Blacks*, *supra* note 11, at 630-31 (emphasis added).

than the single misleading footnote that Finkelman offers.¹²⁵ I will take the liberty of quoting from my earlier article again. That article not only ought to have put Finkelman on notice about Texas specifics, but should have put him on guard with respect to his tendency to wave the fire-eating Mississippi decision, *Mitchell v. Wells*,¹²⁶ as if it were an amazingly-red red-flag that Finkelman himself had first discovered. To continue:

In two other cases, the Texas judges followed Tennessee in refusing to allow a claim of "interstate comity" to interfere with an owner's attempt to manumit his slaves. In *Jones v. Laney*, they refused to accept the argument that a Chickasaw Indian's right to free a slave was invalid in Texas because it was contrary to the laws of the state within which the "Chickasaw nation" dwelt. . . . Neither the state where the will had been made nor the State where the suit for freedom was being heard, however hostile to manumission their policies might be, could abrogate the Indian's right to bestow freedom on his slave.¹²⁷

At this point a footnote intervenes:

Contrast the Mississippi court which, after veering between neutrality and libertarianism until the late 1850s refused to recognize the claims of comity even to the extent of allowing a former Mississippi slave duly freed in Ohio to collect a bequest of money left by her former master in Mississippi. Judge William L. Harris insisted that . . . Ohio was denying comity in freeing blacks at all. He went on . . . "[should] Ohio, further afflicted with her peculiar philanthropy, . . . claim to confer citizenship on the chimpanzee . . . are we to be told that 'comity' will require . . . the States not thus demented, to . . . meet the necessities of the mongrel race thus attempted to be introduced into . . . this confederacy?" In fairness it should be noted that Judge Alex Handy, though also an ardent secessionist, delivered a passionate twenty-four page dissent, arguing that Harris was adopting "barbarian rules which prevailed in the dark ages."¹²⁸

Finkelman, though frequently making much of *Mitchell v. Wells* from near the outset of *An Imperfect Union*,¹²⁹ does not mention Judge Handy's dissent until we get to page 293 and, while featuring the "secessionist impulse" in the opinion, nowhere mentions the "anti-barbarian objection." Finkelman's *Mitchell v. Wells* is rather like a mini-Southern mirror-image of a Lincoln-Douglas debate

125. The only Texas case cited in *An Imperfect Union's* list of cases, see P. FINKELMAN, *supra* note 6, at 364, is Moore's Admr. v. Minerva, 17 Tex. 20 (1856). The list of cases indicates that the sole discussion of *Minerva* appears at page 189 n.17. Note 17 cites *Minerva* as authority for the proposition that "even in these liberal states the trend was moving away from decisions in favor of liberty." *Minerva* was hardly authority for that. See text accompanying note 130 *infra*.

126. 37 Miss. 235 (1859).

127. Nash, *Trial Rights of Blacks*, *supra* note 11, at 634-35 (footnote omitted).

128. *Id.* at 635 n.72 (quoting *Mitchell v. Wells*, 37 Miss. 235, 282 (1859)).

129. See, e.g., P. FINKELMAN, *supra* note 6, at 5-6.

without a "mini-Douglas." To conclude with a final passage from my 1971 essay:

In 1856 *Moore v. Minerva* brought up once again the issue of interstate comity, and . . . raised a further question: that of damages due to an allegedly freed slave for unlawful detention. . . . Mary Minerva's appeal sought both freedom for herself and her children and damages from the administrator of the master's will. In defense, the administrator argued that Minerva's right to freedom under a deed . . . in Ohio was forfeited by her illegal entry into Texas and that the laws of Alabama—where her master had . . . owned most of his property—barred freedom because he had died leaving large debts. . . . Declaring Minerva and her children free, Lipscomb argued that the claims of Ohio law were superior to those of Alabama and Texas. . . . Finally, in regard to damages, Virginia and Kentucky might . . . deny payment for illegal detention. . . . Lipscomb did not agree¹³⁰

Texas, in other words, moves the totals of our pro-comity/anti-comity jurisdictions to one-to-two in the secession states and four-to-three in the slave states as a whole.

An examination of Tennessee's cases produces the same results—if anything even more clearly. Finkelman disposes of the Tennessee position in a footnote that is, frankly, off-the-wall. He says: "Especially see Virginia and Tennessee cases, which indicate that those states remained almost as consistent as Kentucky. . . . Yet, these moderate states showed some change away from comity. Tennessee's cases do not provide a large enough sample to draw any clear conclusions" ¹³¹

Quite apart from the fact that the next-to-last sentence quoted seems to contradict its predecessor, the last sentence is simply untrue. The Tennessee Supreme Court's slavery docket was among the most substantial. Its holdings were surely the most consistently libertarian of any of the longer-settled secession states.¹³² Nowhere in the annals of antebellum Tennessee Reports is there a denial of comity claimed on the basis of a reasonable Northern state holding.¹³³ Only Tennessee confronted all thirteen of the following issues, answering each in the "pro-liberty" affirmative. Thus Tennessee: (1) assured fair hearings of manumission claims;¹³⁴ (2) allowed damages for wrongful detention in slavery;¹³⁵ (3) restricted the presumption

130. Nash, *Trial Rights of Blacks*, *supra* note 11, at 635-36.

131. P. FINKELMAN, *supra* note 6, at 205 n.66.

132. See Nash, *Reason of Slavery*, *supra* note 11, at 123-84, 201 (summary table).

133. Or, for that matter, as far as I can recall, on the basis of an *unreasonable* Northern state comity-related holding.

134. See, e.g., *Sylvia v. Covey*, 12 Tenn. (4 Yer.) 247 (1833) (removal of slaves from owner to prevent their sale prior to judicial hearing of their claim to freedom).

135. See *Woodfolk v. Sweeper*, 21 Tenn. (2 Hum.) 64 (1840); *Matilda v. Crenshaw*, 12

against freedom of dark skin color;¹³⁶ (4) relaxed the rules of evidence to permit hearsay testimony in a claim of freedom;¹³⁷ (5) presumed freedom when confronted with defective court records;¹³⁸ (6) ruled that slaves should be sent to freedom in a place where it was permitted even when the will seemed to condition the grant of freedom on its being exercised in a particular place;¹³⁹ (7) awarded liberty to the children of *statu liberi*;¹⁴⁰ (8) ruled in favor of freedom for slaves notwithstanding allegations of testator insanity;¹⁴¹ (9) winked at "quasi-emancipations";¹⁴² (10) permitted masters to restrict the force of anti-manumission statutes by taking slaves out of state to free them, then upholding the out-of-state bequest;¹⁴³ (11) permitted slaves to choose between freedom or slavery when the will gave them that choice;¹⁴⁴ (12) permitted manumission societies to receive bequests of slaves and take them to free states, territories, or countries;¹⁴⁵ and (13) observed comity in giving effect to other states' laws concerning freeing slaves and bequeathing property to blacks.¹⁴⁶

There is no record on these issues that even begins to approach Tennessee's in scope, number, and consistency. One can get a rough

Tenn. (4 Yer.) 249 (1833) (permitting a second suit, after a successful first suit for freedom, to recover from the ex-master court costs and wages for the time of the first suit's pendency).

136. *Vaughan v. Phebe*, 7-8 Tenn. (Mart. & Yer.) 389, 400 (1827).

137. *See Isaac v. Farnsworth*, 40 Tenn. (3 Head.) 189, 191 (1859) (freeing a slave sold absolutely in a written conveyance by permitting introduction of oral evidence that the slave had had an oral understanding that he would be freed after eight years; "Perhaps in no case was the proof ever more irreconcilably conflicting. . . . [But] it is revolting to see to what an extent some men will go against the rights of the weak, in the eager pursuit of gain."); *Miller v. Denman*, 16 Tenn. (8 Yer.) 156, 158 (1835) (court statement that it had extended "the right to introduce hearsay evidence to the utmost limit and further than other courts of high authority have gone . . .").

138. *See Elias v. Smith*, 25 Tenn. (6 Hum.) 14 (1845).

139. *See Lewis v. Daniel*, 29 Tenn. (10 Hum.) 177 (1849).

140. *See Harris v. Clarissa*, 14 Tenn. (6 Yer.) 153 (1834). The court dismissed a contrary Kentucky holding with the words, "With the reasons for this decision we are not satisfied," 14 Tenn. (6 Yer.) at 163, and criticized the Virginia holding in *Maria v. Surbaugh*, 23 Va. (2 Rand.) 228 (1824), as "a most strict construction, not to say a strained one, in prejudice of human liberty . . ." 14 Tenn. (6 Yer.) at 163. The *Harris* decision was reaffirmed unanimously (including the vote of Judge Nathan Green, who had dissented in *Harris*) in *Hartsell v. George*, 22 Tenn. (3 Hum.) 189 (1842).

141. *See Gass' Heirs v. Gass' Executor*, 22 Tenn. (3 Hum.) 207 (1842).

142. *See Elias v. Smith*, 25 Tenn. (6 Hum.) 14 (1845).

143. *See Blackmore v. Negro Phill*, 15 Tenn. (7 Yer.) 297, 307-09 (1835) (statement to the effect that emancipation in the North would be recognized as valid in Tennessee even if the master had intended to evade Tennessee laws restricting grants of freedom).

144. *See Stephenson v. Harrison*, 40 Tenn. (3 Head.) 500, 505 (1859) (also reaffirming that slaves had standing to sue in court and rejecting the contrary view of some then-recent Southern decisions with the words, "It would be entirely inconsistent with *our* liberal slave and emancipation Code, let *others* be as they may.") (emphasis added).

145. *See Fisher's Negroes v. Dabbs*, 14 Tenn. (6 Yer.) 78, 84-86 (1834).

146. *See Blackmore v. Negro Phill*, 15 Tenn. (7 Yer.) 297 (1835).

sense of the differences by comparing results in five jurisdictions on these thirteen issues. North Carolina's court (the runner-up) gave eight yeses, two noes, and did not hear three of these issues. South Carolina gave three clear yeses, did not hear three issues, and split among its judges and chancellors on the remaining seven. Virginia had three consistent yeses, one clear no, and split on the remaining nine issues. The Georgia court (the single Southern court whose jurisprudence closely resembles that of the *post-Mitchell* Mississippi court) delivered one yes and seven noes on the eight issues that it heard.¹⁴⁷

For Finkelman to tell us that there is not enough Tennessee data to draw any clear conclusions is astonishing. For our purposes, at least two conclusions are quite clear. First, counting Tennessee, the box scores in favor of comity are now: within the secession states only, two-to-two; among all the slave jurisdictions, five-to-three. Second, had Finkelman chosen to "sample" Tennessee rather than Mississippi or Louisiana, his conclusions might have been quite different. With a better "spread," his extrapolations to the South as a whole might have been more accurate.

To continue, I would argue that neither Carolina judiciary had clearly swung over to "war-like anti-comity" by the time of the firing on Fort Sumter. That North Carolina did not is plain from any number of cases but especially from two in the 1850s. In December 1853, Judge Richmond Pearson upheld, in *Alvany v. Powell*,¹⁴⁸ a bequest of over \$9000 to slaves freed and taken out of state by the master's executor. The circumstances are similar, though not identical, to those in *Mitchell v. Wells*.¹⁴⁹ But the judicial reactions are dissimilar in the extreme. Where Harris of Mississippi fulminated about chimpanzees and comity, Pearson of North Carolina stated that "the humanity of our laws strikes off his fetters at once, and says, go 'enjoy life, liberty and the pursuit of happiness.'"¹⁵⁰ Another case, *Redding v. Findley*,¹⁵¹ decided at the late date of December 1858, expressly permitted slaves given a choice by their owner's will to choose between slavery and freedom, thus upholding the very sort of "choice in the will" provision that madly pro-slavery judges thundered should be voided for allowing an object to exercise free will.

147. See Nash, *Reason of Slavery*, *supra* note 11, at 201.

148. 54 N.C. (1 Jones Eq.) 39 (1853).

149. 37 Miss. 235 (1859).

150. 54 N.C. (1 Jones Eq.) at 43.

151. 57 N.C. (4 Jones Eq.) 210 (1858).

There is, in sum, no reason to consider North Carolina slavery jurisprudence less typical of the Southern legal movement relating to the comity issues than that of *either* (and fairly similar) Tennessee *or* (and quite different) that of Mississippi or Georgia. Thus, we score, so far: the seceding states alone, three-to-two for comity; the slave states, six-to-three for comity.

It is not practical at this juncture to explore the comity-related jurisprudence of the other six slave jurisdictions in quite the detail that we have so far. But it is not altogether necessary to our present purpose, in part because to resolve the point at issue we have only to "count" as far as is needed to determine whether a majority can be found "against comity," and in part because the evidence regarding some of the remaining six is so plain as to require little debate.

The latter is the case with respect to three jurisdictions — Georgia, Florida, and Arkansas. Georgia belongs on the anti-comity side of the ledger¹⁵² — though admittedly the court majority was occasionally restrained by contrary precedent. The evidence from Florida is sparse because slavery litigation in that state was rare. However, what there is does not support Finkelman's thesis. In the only case directly raising a comity issue, *Sibley v. Maria*,¹⁵³ the Florida court in 1849 interpreted an 1820 South Carolina anti-manumission statute in a way that freed a South Carolina slave removed to Florida, notwithstanding the fact that eight years earlier the South Carolina legislature had rebuffed the South Carolina Court of Appeals for choosing that same interpretation. Indeed, as Sibley's counsel expressly noted before the Florida Court, the South Carolina Equity Court had in the intervening years altered its interpretation to follow that legislative judgment.¹⁵⁴ There was a second comity aspect to *Sibley v. Maria*. Since both interpretations agreed that manumission in South Carolina would have been illegal, in order to free Maria it was necessary to presume that she had been removed to Ohio (designated in the testator's alternate instruction) and that she had there posted the required \$500 good behavior bond. Neither presumption was very likely to be accurate. Yet the court so presumed despite the absence of any Ohio record of manumission.¹⁵⁵ Consequently, I disagree with Finkelman and would score Florida pro-comity.

The same may be said for Arkansas. As I have argued else-

152. See Reid, *supra* note 11, at 578-81; Stephenson & Stephenson, *supra* note 11, at 602.

153. 2 Fla. 553 (1849). For a detailed discussion, see A. Nash, *supra* note 30, at 337-43.

154. 2 Fla. at 557.

155. 2 Fla. at 555-56.

where,¹⁵⁶ what evidence we have of the not-very-well-known judges of that state's antebellum appellate court goes generally and strongly to the view that its members, though themselves sympathetic to the peculiar institution and much aware of external pressures upon it, nonetheless strove for neutrality of judicial decision making. A statement of Judge Hubert Fairchild on the very eve of Civil War, in July 1860, well exemplifies this:¹⁵⁷

The question of freedom should be determined . . . solely upon its legal aspects, without partiality to an applicant for freedom, because he may be defenseless, and a member of an inferior race, and certainly without prejudice to his kind and color, and without regard to the sincere convictions that all candid, observing men must entertain, that a change from the condition of servitude and protection, to that of being free negroes, is injurious to the community, and more unfortunate to the emancipated negro than to anyone else.¹⁵⁸

Though speaking with a forked racist tongue, Judge Fairchild in 1860 freed slaves slated to receive liberty, notwithstanding an 1859 Arkansas statute forbidding all post-mortem manumission. Georgia and Mississippi judges of the Lumpkin and Harris "anti-comity" sort surely would not have so held.

Our final count of the slave states we discussed is expressed in Table I:

TABLE I

<u>For Comity</u>	<u>Against Comity</u>
Seceding states	
Arkansas	Georgia
Florida	Louisiana
North Carolina	Mississippi (after 1859)
Tennessee	
Texas	
Other slave states	
Delaware	Missouri
Kentucky	
Maryland	

Comity was favored five-to-three among the seceding states alone, and eight-to-four among all the slaveholding jurisdictions. On *my* reading of the cases in the various jurisdictions that we have so far

156. See A. Nash, *supra* note 30, at 333-36.

157. Finkelman cites only one Arkansas case, *Rheubottom v. Sadler*, 19 Ark. 491 (1858), apparently as evidence of an anti-comity inclination. See P. FINKELMAN, *supra* note 6, at 190 n.18. The case does not bear out any such imputation.

158. *Phebe v. Quillin*, 21 Ark. 490, 500 (1860).

considered, *and* ignoring any doubting queries as to Finkelman's readings of his "own four States," *and* without giving the best "strong reading" of Virginia, South Carolina, and Alabama cases, then the notion that denial of comity was almost unanimous on the eve of the Civil War is plainly false whichever way one counts. Moreover, Finkelman's related generalization — that *most* Southern states began to reject comity-based claims of freedom — is false at least for slaveholding states as a whole. After all, as a majority of those states did not reject comity, "most" cannot be "against." And if anything is obvious at all, it is that the Southern states *did not* deny comity "almost in unison."

Thus, Finkelman's "strong reading" *is* a misreading. His "weaker reading" is also a misreading for the slaveholding states as a whole. To prove his point for the seceding states alone, he would have to demonstrate that the judicial behavior in the three states we have not looked at support his hypothesis. While I do not propose to conduct a jurisdiction-by-jurisdiction examination of the remaining states in order to show the impossibility of such a demonstration, I shall make two quick points going in that direction. First, an examination of the South Carolina Court of Appeals under the leadership of Judge John Belton O'Neill suggests that comity's foes in that state lost out at the highest judicial level.¹⁵⁹ Second, even Finkelman seems to think that an "anti-comity case" against the Virginia Court of Appeals is not very strong.¹⁶⁰

These observations made, it is possible to show quite swiftly the problems with Professor Finkelman's other generalizations.

2. *Two Simplistic Generalizations*

Finkelman asserts that "fidelity to law — this impartiality of decision making — began to fade in the 1830s and disappeared throughout most of the South before 1860" and also that "fidelity to . . . slavery was more important than fidelity to abstract concepts of law."¹⁶¹ There are two difficulties here.

First, assuming that "fidelity to law" and "impartiality of decision-making" are fungible and obvious entities, the evidence that either one or (fungibly) both disappeared throughout most of the South simply is not there — assuming also, of course, that here as elsewhere in *An Imperfect Union* Finkelman is talking about states'

159. See Nash, *Negro Rights, Unionism, and Greatness on the South Carolina Court of Appeals: The Extraordinary Chief Justice John Belton O'Neill*, 21 S.C. L. REV. 141, 175 (1969).

160. See P. FINKELMAN, *supra* note 6, at 189 n.17.

161. *Id.* at 182.

appellate courts and not about plantation (in)justice or lynch-mobs. The difficulty is similar to that which we have found in our enumeration of comity-related holdings. Professor Finkelman's generalizations about Southern appellate judiciaries have, exposed to mundane facts, a Cheshire cat aspect about them: they tend to disappear.

The second difficulty relates to the assumption just made *arguendo* — namely, that there is something clear and certain called “fidelity to law,” that, moreover, can be measured against something else called “fidelity to slavery.”

Two oversimplifications are intertwined here. The first lies in Finkelman's unstated major premise that by 1860 Southern appellate judges were, willy-nilly and by the force of greater historical events, placed in the awkward position of having to choose between “abstract concepts of law” and “slavery.” Again, our examination so far suggests that for many Southern judges this was simply not so.

The second oversimplification is what Marxist historians might call a “bourgeois oversimplification.” That is to say, there is a hidden identification of “law” with certain identifiable values that “reasonable men” would agree about. On this view of the matter, law that does not display these values in the “right” hierarchy is implicitly “not law.” The latter half of the generalization, in other words, is arguably simplistic because of its legal ontology. It conflates “good law” and “true law” and sets up a polar opposite, also conflated, which is sometimes thought of just as “bad law” but which often is thought of as “un-law” or “not law.” It is, if you will, a simplifying bourgeois variant of “natural lawism” that is bothersomely afoot.

The problem with another of Finkelman's generalizations can be put in a single sentence. It is not very helpful to assert that “slave state courts reflected the attitudes of the people they served”¹⁶² without specifying further: (a) how they “reflected”; (b) whom they “served”; and (c) whether the “reflecting” was in some fashion unique to the slave South or whether such “reflecting” as occurred was merely an instance of a general American attitude.

3. *Muddy, Confused, or Otherwise Problematic Generalizations*

Finkelman generalizes that by the 1850s “most of the South had, to one degree or another, decided that interstate comity could not extend to cases involving slaves who claimed to be free.”¹⁶³ This is

162. *Id.* at 234.

163. *Id.* at 189-90.

muddy. If "most of the South" means a majority of all adult Southerners, then there is no practical way of verifying the contention. If "most of the South" means "most Southern appellate court judges," then the statement is *either false or* meaninglessly true. It is false if "to one degree or another" means roughly to cover the span from "somewhat disinclined to extend comity" to "very disinclined to extend comity." It is meaninglessly true if "to one degree or another" includes roughly the range from "not so deciding" to "definitely deciding." That includes almost every viewpoint. The resulting "truth" is meaningless because the sentence's opposite — "most . . . had, to one degree or another, decided that interstate comity *could be* extended" — is equally true.

Two generalizations deserve treatment together because both aim at explaining the shift in Southern slavery jurisprudence that Finkelman (rightly or wrongly) perceives. The first of these asserts that although "it would be convenient . . . to argue" that the decline in Southern tendencies to grant comity was a "response to northern decisions denying comity to slaveowners in transit. . . . it is not at all clear that the change came about in this way."¹⁶⁴ The other generalization notes that Southern courts liberated slaves "who had spent time in the North well *before* northern courts freed slaves in transit" and then concludes that "[i]t surely would be absurd to argue that southern jurists reversed their own precedents because northern jurists had endorsed them."¹⁶⁵

These sentences are both important and artless. They are important in two ways. First, they are part of a central passage in which Finkelman seeks to explain the course of Southern comity-related adjudications in a fashion that exculpates Northern courts from causing any Southern reversal, and that lays responsibility more generally on the changing climate of opinion North and South.

Second, the sentences are important because of what their very artlessness gives away. Their artlessness consists primarily in two parts. Part one lies in the tell-tale phrase, "it would be convenient." Convenient to what? It might be convenient because it would sustain, according to Finkelman, "some legal historians"¹⁶⁶ who have argued that Southern courts "ceased granting comity . . . in response to northern decisions denying comity to slaveowners in transit."¹⁶⁷ I suspect that, in fact, this would prove *inconvenient* to

164. *Id.* at 182-83.

165. *Id.* (emphasis in original). For similar statements, see *id.* at 234-35.

166. Finkelman cites only one, Don Fehrenbacher. See *id.* at 183.

167. *Id.* at 183.

Finkelman just because it would be convenient for Fehrenbacher, whom Finkelman is seeking to discredit on the issue. And it would be convenient (read "*inconvenient* to Finkelman") for the purpose of "exculpating" Southern judicial behavior. That it would be *inconvenient* to Finkelman is strongly suggested by the wording of the other generalization's conclusion — which amounts to the second artlessness of the analysis.

A close look at what Finkelman says reveals that he does not say what I imagine most readers would, after a quick reading, tell you he had said. How so? The second generalization contains two sentences that, on hurried inspection, appear to be four-square both with each other and with the notion that the decline in Southern grants of comity was a "response to northern decisions denying comity to slaveowners in transit." Quickly read, the second generalization appears to tell us: (1) that Southern courts freed slaves on the basis of certain conditions or events obtaining in the North before Northern courts did the same sort of thing; (2) that it would be silly to think that Southern courts got annoyed because Northern courts started to follow Southern precedents; and (3) that therefore, the Southern reaction must have originated in some other reason — a reason not traceable to Northern judicial behavior.

But Finkelman doesn't really establish this at all. Of course it is true that it would be absurd to argue that "Southern jurists reversed their own precedents because northern jurists had endorsed them." But *in fact*, Southern jurists never did what too quick a reading of Finkelman's generalizations would suggest they did — free slaves whose masters had "transitted" them across the North.

The vagueness of the phrase "freed slaves who had spent time," is critical to the consequent misreading. All that earlier Southern courts actually did in this connection was to free in some instances *either* slaves who had worked for a considerable period of time with their masters' permission in free states *or* slaves who had been brought into Northern states for periods exceeding some statutory period not perceived by Southern courts as intolerably short. In addition, these courts sometimes permitted Southern masters to evade the restrictive terms of Southern anti-manumission laws by taking favored slaves to the North, there executing manumissions in accordance with Northern law, and then returning south.

But these Southern courts had *never* freed slaves from the grasp of masters in transit through free territories. Of course, it *would* be absurd to suppose that Southern courts reacted adversely to the Northern courts that followed Southern precedents. But that was

not at all what Northern courts of the later antebellum era began to do.

Finkelman's generalizations on this matter reveal a crucial flaw in his mode of analysis. He fails to work out what is needed for a satisfactory analysis of the problem of comity and antebellum slavery: a "neutral model" of what comity might be said to require, under what circumstances, and under what readings of "comity."

The consequences of this analytic flaw are several. One is that it makes possible uncritical assertions such as the last of the two generalizations over which we have just paused. It also facilitates Finkelman's assertion that the late antebellum years witnessed a trend "away from decisions in favor of liberty."¹⁶⁸ That is true but rather indefinite. A third unfortunate consequence is the aid lent Finkelman's attempt to specify further trends away from comity by stating that the dissenting judges of *Mitchell v. Wells*¹⁶⁹ and of *Lemmon v. People*¹⁷⁰ "sensed, but could not admit . . . that the legal systems of the North and South could no longer coexist. . . . Within the realm of state action *Lemmon* represented the final development in the law of freedom, while *Mitchell* symbolized the ultimate logic of the law of bondage."¹⁷¹

Part of this generalization is mere assertion. Finkelman offers no convincing evidence that *none* of the judges in the two cases were able to admit that the legal systems of the North and South could not coexist. Indeed, Harris of Mississippi seemed boldly to assert the point. One other part of this generalization is also, as yet, mere assertion. Finkelman declares that *Lemmon* is a "final development" and that *Mitchell* "symbolized the ultimate logic of the law of bondage." Perhaps. Perhaps not. The way that Finkelman states the contention prevents the reader from determining whether it is intended as an empirical generalization as to where the laws of the two sections were going, or whether it is intended as some kind of deductive assertion about the necessary evolution of nineteenth century American law.

As we have seen, such an empirical generalization lacks adequate supporting evidence. Such a deductive assertion is not susceptible to testing within Finkelman's explicit framework, in part because of his failure to specify a clear model of what a neutral comity would have looked like. It is also so in part because the relations among law-

168. *Id.* at 189 (footnote omitted).

169. 37 Miss. 235 (1859).

170. 20 N.Y. 562 (1860).

171. P. FINKELMAN, *supra* note 6, at 310.

made-by-judges, law-made-by-legislators, climates of opinion, and the underlying forces of economy, society, and polity remain ill-worked out in *An Imperfect Union*.

Finkelman's work does not contain, in other words, an adequate key to some of its mystifying and important assertions. For that reason, it is now appropriate to consider Mark Tushnet's approach to radical interpretation of American law. Whatever its other virtues and vices, it *does* proceed from an explicit (Marxist) set of assumptions about the relations of law, individual, and economy.

II. THE POSSIBILITY OF A "NON-REDUCTIONIST" MARXIST GENERAL THEORY OF AMERICAN LAW

A. *Non-Marxist Criticisms of Tushnet on the Law of Slavery*

Mark Tushnet's much-critiqued *The American Law of Slavery, 1810-1860* has baffled in whole or in part a fair number of lawyers and legal historians. Only two of the four main causes of this bafflement have been much pointed out. One is that his writing is less clear than it might be. The other is that he proceeds in an ahistorical fashion — both "externally" and "internally." By "externally" I mean, pursuant to the usual jargon of legal history,¹⁷² that he does not relate the legal history with which he is grappling to the society, polity, and economy "external to" the law. Thus, for example, Wiecek asks:

What then accounts for the relative "liberalism" . . . of the early Mississippi Court . . . and the harsh posture of the later Mississippi court . . . ? If Tushnet had explored outside the case reports, he would have discovered that the minds of white southerners were traumatized by a series of incidents . . . that led them universally to repudiate it [relative "liberalism"] with a . . . garrison mentality that, as one of its necessary consequences, suppressed the humanity of the slaves.¹⁷³

Wiecek then lists a set of well-known events beginning with the 1819-1820 congressional debates surrounding Missouri's admission to statehood and ending with Nat Turner's Virginia rebellion in 1831. He continues: "Judicial attitudes changed promptly and reflexively. . . . I . . . suggest that . . . obvious events outside the legal arena more readily explain southern judicial behavior."¹⁷⁴ Putting aside the problematic historical question whether and how

172. See Gordon, *Introduction: J. Willard Hurst and the Common Law Tradition in American Legal Historiography*, 10 LAW & SOC'Y. REV. 9 (1975).

173. Wiecek, *supra* note 11, at 281.

174. *Id.* at 282.

directly judicial attitudes in fact "promptly changed,"¹⁷⁵ we can at least see the main criticism directed against the writing of legal history: the contention that a better (read "simpler") explanation can be found in the law's "external" reflexive response to the larger political world.

By "internally" I mean, again pursuant to legal-historical jargon, the criticism that Tushnet does not get the order of events straight within the law — within its relevant cases and statutes, or between and among its cases and statutes. Thus, Finkelman observes that "Tushnet . . . has little regard for chronology For example, in a 'largely chronological' discussion of Georgia manumission cases, Tushnet discusses, in the following order, cases from 1858, 1860, 1857, 1858, and 1860."¹⁷⁶ He also commits, according to Finkelman, a spatial error related to this temporal heresy. Tushnet makes "no distinctions between the upper South and the lower South. He writes about 'the slave states' or 'the South' as if all fifteen states were part of a jurisdictional monolith. He quotes from three or more state courts without ever mentioning that his materials come from different jurisdictions."¹⁷⁷ Perhaps worse, from Finkelman's viewpoint, Tushnet plays fast and loose with the "internal" data when it comes to explaining slavery law's development: "He seriously misstates the facts in *State v. Jarrott* (p. 112), and alters them in his discussion of *State v. Tackett* (p. 100)."¹⁷⁸

The third of four sources of bafflement is itself composed of two factors. One factor is, seemingly, unease that Marxists are around in the late twentieth century United States, not, as at mid-century, restricting themselves to stealing A-bomb secrets and attacking the X in Xmas, but actually now (re)writing (sacred) American history. The other is an American reflex-assumption that Marxist historiography will necessarily be intellectually simplistic in its accounting of the relationships between economic infra-structure and the super-structure of "the law." After all, and especially in America, "no one is ever neutral about Marx."¹⁷⁹ That, however, does not mean that everyone is knowledgeable about Old Karl. Even those of us who, educated to think of *Das Kapital* as belonging to an "outside the first

175. The balance of the historiography on the subject suggests that the change was both slower than "prompt" and more complicated than merely "reflexive."

176. Finkelman, *supra* note 11, at 359.

177. *Id.*

178. *Id.* Finkelman does not, however, specify how the facts are altered.

179. E. KURZWEIL, *THE AGE OF STRUCTURALISM: LEVY-STRAUSS TO FOUCAULT* 53 (1980).

amendment" category of unprotected quasi-obscene literary essays, consider ourselves unlikely to be subverted, may be mistaken in how we approach Marxist legal analysis.

To say that is to indicate the fourth, and perhaps the most important, source of bafflement that some may experience when reading Tushnet on the law of American slavery. It comes from not realizing that *The American Law of Slavery* is as much connected to Tushnet's intellectual explorations in twentieth century American constitutional law as it is to the debate over nineteenth century slavery law. To understand Tushnet on slavery, one must understand Tushnet's work as a whole, those "innumerable" articles which Milner S. Ball has characterized as "the fallout of a Mt. St. Helen's eruption of scholarship."¹⁸⁰ That is so in part because of the clues these works provide as to the main features of Tushnet's Marxist intellectual topography and in turn as to why Tushnet may make slip-ups that from his own angle seem relatively unimportant whereas to a non-Marxist they seem devastating.¹⁸¹

But there is a more important reason for looking at Tushnet-on-slavery in light of Tushnet-on-the-American-Constitution-today. Tushnet is, among the current generation of American law scholars, the only individual who has essayed sustained, serious endeavors both in legal history and in constitutional law while being reasonably *au courant* in a third approach to the law — political science's judicial-process-and-behavior approach. In addition, Tushnet says he is a Marxist. Is there a potentially important moral for the study

180. Ball, *Don't Die Don Quixote: A Response and Alternative to Tushnet, Bobbitt, and the Revised Texas Version of Constitutional Law*, 59 TEX. L. REV. 787, 793 n.42 (1981).

181. See Watson, *Slave Law: History and Ideology* (Book Review), 91 YALE L.J. 1034 (1982). Briefly, Watson makes the following points about four of Tushnet's chief "case-studies":

(a) that Tushnet's argument about the omission of a tort rationale from the leading antebellum Southern "fellow servant rule" case, *Ponton v. Wilmington & Weldon R.R.*, 51 N.C. 246, 6 Jones 245 (1858), is not convincing. Watson, *supra*, at 1038;

(b) that Tushnet errs in arguing that rules of liability adopted in a particular Georgia case, *Gorman v. Campbell*, 14 Ga. 137 (1853), could only have been justified by claims of humanity (rather than, as Watson argues, on grounds of appropriate rules of contract). Watson, *supra*, at 1040-42;

(c) that Tushnet misreads Thomas Ruffin's opinion in the much-debated North Carolina case, *State v. Mann*, 13 N.C. 229, 2 Dev. 263 (1829). Watson, *supra*, at 1042-44; and

(d) that Tushnet's explanation for the fourth case in question, *Jourdan v. Patton*, 5 Mart. 615 (La. 1818) also is erroneous:

[T]his is nonsense on various levels. First, Tushnet has no right, without evidence or argument, to posit the theory on which the trial court based liability. In fact, Tushnet in this case is demonstrably wrong — the rule was simply taken from Spanish and French law, which in turn had taken it from Roman law.

Watson, *supra*, at 1045. In all, for Watson, "Tushnet's Marxist analysis reveals itself as fundamentally sterile." *Id.* at 1044. "Tushnet's failure in his analysis of the cases . . . should mean that the book will convince only those predisposed to believe the theory." *Id.* at 1047.

of American law in general at a time of crisis in the American polity? This part lays the ground for examining this question by considering other non-Marxist reactions to Tushnet's writing on constitutional issues and linking them with more general reactions to radical interpretations in legal history and political science. It then further develops the basis for inquiry by exploring Tushnet's broader, if shifting, program for a Marxist analysis of American Law.

B. *Non-Marxist Criticism of Tushnet on "Liberal" Constitutional Interpretation, or: Coming At Constitutional Debating Issues From the Extra-Paradigmatic North*

Writing three years ago in this *Review*, Tushnet (easily the most prolific of younger constitutional law scholars) expressed the wish that his critique of Professor Laurence Tribe (easily the most cited of almost-as-young constitutional law scholars) be taken, not as coming from a particular point on the conventional left-right political spectrum, but rather from some unrelated direction, "say, the north."¹⁸² To a certain extent, Professor Tushnet got his wish. Judge Richard A. Posner took Tushnet's critique to be coming from off-the-street and aiming several inches below the belt. Indeed, then-Professor Posner thought Tushnet's imputation of Tribe's motives in writing *American Constitutional Law*¹⁸³ illustrative of a broader problem in recent legal scholarship coming from the "Critical Legal Studies" movement.¹⁸⁴ Said Posner in a recent Yale Law School Symposium on the state of legal education and scholarship:

Some Marxists play by different rules from those of the other norma-

182. Tushnet, *Dia-Tribe*, 78 MICH. L. REV. 694, 694 (1980) (reviewing L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (1978)).

183. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (1978). Presumably, it was Tushnet's concluding paragraphs that most distressed Judge Posner:

I hope that what has gone before raises a serious puzzle: how could so morally obtuse a work be taken so seriously? The answer can be found in Professor Tribe's ambition, which, like that of constitutional scholars generally, lies outside the world of scholarship and in the world of contemporary public affairs. Not that there is anything intrinsically wrong with ambition. . . . Most of us have imagined ourselves as Justices of the Supreme Court, and Professor Tribe . . . would surely be a better Justice than many.

The question, though, is to what activities the rewards of ambition accrue. In . . . public affairs, they accrue not necessarily to intellectual substance. One who addresses the real questions of justice is by that fact alone disqualified . . . I take some pleasure, not however unmixed with regret, in noting that the Framers would have understood the phenomenon that Professor Tribe's work represents: they called it corruption. Tushnet, *supra* note 182, at 710 (footnote omitted).

184. For a recent discussion of the "Conference on Critical Legal Studies," which "attempts to bring together scholars involved in radical legal studies and includes such notables as Duncan Kennedy, Morton Horwitz, Karl Klare, Mark Tushnet, and Roberto Unger," see Note, *'Round and 'Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship*, 95 HARV. L. REV. 1669, 1669 n.3 (1982); see also Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563 (1983).

tive scholars, and rather ugly ones. I am thinking, for example, of Tushnet's recent unpardonable personal abuse of Laurence Tribe. The Marxist scholars question the objectivity and integrity of the non-Marxists, whom they accuse of prostituting their intellectual abilities to personal or class interests. By this reasoning, the Marxists' motives should be equally suspect. Their emphasis on scholars' motives is, however, a distraction. Scholarship should be evaluated on its merits; it should not be disparaged by reference to the presumed motives of its practitioners.¹⁸⁵

Posner's reaction may not be exactly what Tushnet hoped for. The Siberian North was probably not the direction Tushnet intended to come from — although it is conceivable that he sought to exacerbate the internal contradictions of capitalist legal scholarship by raising its blood-pressure. Given my own diffidence about readily getting inside other people's minds, I cannot say. Yet two observations do seem fairly inferrable. The lesser is that Tushnet should deem discretion the better part of valor and stay out of Judge Posner's jurisdiction lest some of Tushnet's goods and baggage be seized and transferred to other persons valuing them more highly.¹⁸⁶

The more important, and more serious, observation is that Posner's reaction itself exemplifies a recurrent problem in American legal scholarship, indeed in American intellectual life generally. The problem is the difficulty that Marxists face in getting themselves taken seriously, or even read accurately. In the instant case, Posner seems to skip over both the substance of Tushnet's argument and the qualifying sentence preceding Tushnet's comments about Tribe's motivations. Although Tushnet's argument can be questioned, it is nonetheless seriously intended and novel. It is grounded in the general contention that *American Constitutional Law*, like much else in contemporary constitutional scholarship, mistakes at its base the "central issue in political philosophy today."¹⁸⁷

Specifically, Tushnet contends that *American Constitutional Law*, having mistaken the central issue, (mis)organizes itself around four

185. Posner, *The Present Situation in Legal Scholarship*, 90 YALE L.J. 1113, 1127 (1981) (footnote omitted).

186. See the discussion of the forcible taking from Derek of a book he values at \$2 and the giving of it to Amartya, who values it at \$3, so as to increase the total societal wealth, in Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191, 197-99 (1980), and Posner's reply in Posner, *The Value of Wealth: A Comment on Dworkin and Kronman*, 9 J. LEGAL STUD. 243, 244-50 (1980).

187. Tushnet, *supra* note 182, at 696. The central issue is, according to Tushnet, not what one would think "from reading law reviews, . . . whether abortion is morally permissible, . . . [or] whether remedial action that takes race explicitly into account is justified." *Id.* Rather, "the real one that has animated philosophical discussion . . . is which social-economic system, capitalism or socialism, justice demands. That is what John Rawls and Robert Nozick are concerned with . . ." *Id.*

premises: (1) that the Constitution aims at securing justice; (2) that the Constitution "can fairly be interpreted to . . . approximate the accomplishment of justice";¹⁸⁸ (3) that the Supreme Court should engage in constitutional interpretation that promotes justice, the "premise . . . around which the standard controversies in constitutional theory rage";¹⁸⁹ and (4) (whence "the fundamental contradictions within the treatise emanate"¹⁹⁰) that the Supreme Court's recent decisions, be they those of the late Warren Court or of the Burger Court, "are reasonable approximations of justice."¹⁹¹ I do not agree with much of this.¹⁹² Nonetheless, the driving moral intent behind Tushnet's critique seems clear.

Tushnet's criticism proceeds, after all, regardless of its merits or lack thereof, from the moral judgment that there is something deeply wrong both with what gets onto the agenda of public law discussion and what is left off. His concern addresses what professors of law, that part of the nation's intellectual elite most influential in determining the perception of the law's role in shaping public needs, do and don't do. The mode of conducting the debates, the determination of what the "de rigeur" debate topics are (for example, whether "interpretivism" is, or is not, an intellectually viable approach to the constitutionality of statutes,¹⁹³ and whether a particular notorious

188. *Id.* at 694.

189. *Id.*

190. *Id.* at 695.

191. *Id.*

192. Let me just note here two points of divergence — at the risk of being taken as an immoderate "originalist" and hence a constitutional fundamentalist of either the Protestant or Catholic legal persuasion. For discussions of "originalism" and "the civil religion of the constitution," see Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980); Levinson, "The Constitution" in *American Civil Religion*, 1979 SUP. CT. REV. 123. I find it problematic that Tushnet's description of Tribe's first premise does not separate out two of its possible meanings. One is whether *the single* (or even *the main*) aim of the Framers was "to secure justice" — which seems to me doubtful — or whether it was more centrally to improve the ex-Colonies' commercial conditions and capacity for external defense. The other matter of meaning is whether now, after nearly two centuries of amendment and interpretation, it is better to speak of a "glossed Constitution" as itself "aiming at justice" or whether it is more helpful to think in a less reifying fashion *either* of it as containing specific propositions that so "aim" *or* of it or its particular propositions as something(s) that individuals (or groups, or classes) "aim" at justice in particular (sets of) circumstances.

Putting aside the question of whether these four premises all in fact best describe the underpinnings of Professor Tribe's organizational modes and analytic objectives, I should have thought that more of the current "standard controversies in constitutional theory rage," if they rage at all, around the content of the fourth premise (whether recent Supreme Court decisions approximate justice), than around the content of the third (whether the Court should aim at accomplishing justice). Even Justice Rehnquist rarely argues for a contrary aim.

193. See C. BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969); J. ELY, *DEMOCRACY AND DISTRUST* (1980); Brest, *supra* note 192; Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982); Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843 (1978); Grey, *Do We Have an*

case — be it *Kras*,¹⁹⁴ *Bellotti*,¹⁹⁵ *National League of Cities*,¹⁹⁶ or *Roe v. Wade*¹⁹⁷ — can be squared with justice), and, ultimately, how much justice and how much injustice will be done are all to an important extent *prima facie* “responsibilities” of that elite. If one starts from that position, as does Tushnet, it is much less gratuitously insulting than ethically and analytically necessary to ask why a scholar building so enormous an intellectual edifice as Tribe’s treatise (mis)constructs it as he does. In turn, an inquiry into motivations and, if the inquiry calls for it, an adverse judgment concerning those motivations flow quite naturally from Tushnet’s normative starting point. He is simply instancing a particular “*trahison des clercs*”¹⁹⁸ — in this case the “treason” of a once-clerk and, Tushnet

Unwritten Constitution?, 27 STAN. L. REV. 703 (1975); Kurland, *Curia Regis, Some Comments on the Divine Right of Kings and Courts “To Say What the Law Is”*, 23 ARIZ. L. REV. 581 (1981); Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227 (1972); Monaghan, *Taking Supreme Court Opinions Seriously*, 39 MD. L. REV. 1 (1979); Parker, *The Past of Constitutional Theory — and its Future*, 42 OHIO ST. L.J. 223 (1981); Perry, *Interpretivism, Freedom of Expression, and Equal Protection*, 42 OHIO ST. L.J. 261 (1981); Laycock, *Taking Constitutions Seriously: A Theory of Judicial Review* (Book Review), 59 TEX. L. REV. 343 (1981); Levinson, *Judicial Review and the Problem of the Comprehensible Constitution* (Book Review), 59 TEX. L. REV. 395 (1981).

194. *United States v. Kras*, 409 U.S. 434 (1973) (sustaining the constitutionality of a law requiring payment of a \$50 filing fee, spreadable over a maximum of nine months, as a condition precedent to obtaining bankruptcy discharge). This case is notorious as far as Tushnet and the four dissenters, Douglas, Brennan, Stewart, and Marshall, are concerned. See Tushnet, “*. . . And Only Wealth Will Buy You Justice*” — *Some Notes on the Supreme Court, 1972 Term*, 1974 WIS. L. REV. 177, 184-85 (discussing the Term during which Tushnet was one of Justice Marshall’s clerks and *Kras* was handed down). For other critical commentary on *Kras*, see L. TRIBE, *supra* note 183, at 1009, 1120-22; Binion, *The Disadvantaged Before the Burger Court: The Newest Unequal Protection*, 4 LAW & POL. Q. 37, 44-47 (1982); Clune, *The Supreme Court’s Treatment of Wealth Discriminations Under the Fourteenth Amendment*, 1975 SUP. CT. REV. 289, 314-15.

195. *First Natl. Bank v. Bellotti*, 435 U.S. 765 (1978) (striking down, as violative of first and fourteenth amendment free speech rights, a Massachusetts statute limiting corporations’ expenditures for expressing company views concerning upcoming referenda proposals that did not materially affect its business interests).

196. *National League of Cities v. Usery*, 426 U.S. 833 (1976) (invalidating the 1974 amendments to the Fair Labor Standards Act extending maximum hours and minimum wage provisions to state, county, and municipal employees). Tushnet characterizes Tribe’s sympathetic treatment of the majority position, see L. TRIBE, *supra* note 183, at 308-18, as “tendentious,” and the majority position itself as one “that reeks of the American Enterprise Institute.” Tushnet, *supra* note 182, at 698.

197. 410 U.S. 113 (1973). Tushnet, at least as to outcome, would not consider that case “notorious.” But see Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973); J. ELY, *supra* note 193, at 248 n.52 (updating of Ely’s view on the issue); see also Epstein, *Substantive Due Process By Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159.

198. See J. BENDA, *LA TRAHISON DES CLERCS* (1927). Benda’s objection to many intellectuals of his generation was to be sure a bit different as to what they betrayed:

About 1890, the men of letters, especially in France and Italy, realized with astonishing astuteness that the doctrines of arbitrary authority . . . contempt for the spirit of liberty, assertion of the morality of war . . . were . . . poses infinitely more likely to strike the imagination of simple souls than . . . Liberalism and Humanitarianism.

thinks, would-be future king (or at least judicial employer) of clerks.

On this view of the matter, Posner's reprimand for "un-bourgeois" intellectual manners misses the point. There are two points really. One is that it does not accomplish much for us bourgeois, who are thereby made uncomfortable, simply to enjoin those who are deliberately rejecting "bourgeois niceties." The other is that we may be better off being less dismissive and more enquiring into the sources of the objectionable behavior. We might learn something unpleasant but useful.

Before leaving Posner's reprimand, we need to note two further costs of such a peremptory dismissal. First, note how casually it leaps from ruling beyond the pale "*some* Marxists" who play by ugly rules (and note how "some" at first equals one, Tushnet) to all Marxists: "*The* Marxist scholars question the objectivity and integrity of the non-Marxists By this reasoning, *the* Marxists' motives should be equally suspect."¹⁹⁹ This *non sequitur* is as sloppy as anything I have seen Tushnet pen in a rush.

Second, but more important, the phrase "by this reasoning" misunderstands the Marxist position on three counts. One, it is no surprise that Marxist scholars question (whether politely or rudely) the objectivity of non-Marxist scholars. Marxism "expects" non-Marxist scholars to wear ideological blinders, and in this case they are arguably right. But, two, it does not follow from "this reasoning" that the Marxists' motives should be equally suspect because, of course (and this is the very devil of it from our non-Marxist viewpoint), Marxism argues that "its" scholars transcend ideologically induced misperception and achieve objectivity. Three, in arguing that "emphasis on scholars' motives is a distraction" and that scholarship should "not be disparaged by reference to . . . presumed motives" but rather "evaluated on its merits,"²⁰⁰ Posner adopts by fiat precisely the bourgeois interpretive canons that Marxist analysis rejects. Interestingly, given recent articles in law reviews and political science journals urging the applicability to constitutional interpretation of hermeneutics and post-structuralist methods of literary interpretation,²⁰¹ these canons have lately been much questioned in ancillary

J. BENDA, *BETRAYAL OF THE INTELLECTUALS* 135 (R. Aldington trans. 1955).

199. Posner, *supra* note 185, at 1127 (emphasis added).

200. Posner's position respecting legal scholarship curiously approximates that of the New Critical School of the 1940s in American literary criticism.

201. See Abraham, *Statutory Interpretation and Literary Theory*, 32 *RUTGERS L. REV.* 676 (1979) (discussing statutory interpretation, but also applicable to constitutional interpretation); Brest, *Interpretation and Interest*, 34 *STAN. L. REV.* 765 (1982); Deutsch, *Law As Metaphor: A Structural Analysis of the Legal Process*, 66 *GEO. L.J.* 1339 (1978); Harris, *Bonding Word and*

interpretive disciplines by non-Marxists.²⁰² Posner's fiat, in short, makes us — if we accept it — adopt blinders that prevent us from learning much beyond good etiquette. They exemplify a cross-epistemological and cross-ontological problem of divergent analytic approaches more than they solve it.

I have belabored Posner's comments a bit both because I think they may resemble the reactions of many constitutional scholars when confronted with Marxist legal analysis and because they have symptomatic counterparts in reactions to "radical analysis" arising in two domains of inquiry relatively proximate to constitutional scholarship — legal history and political science. I shall give just one example pertaining to each.

The first comes from American legal history. I have in mind *Boundaries of Realism*,²⁰³ Professor Peter Teachout's lengthy review of G. Edward White's *Tort Law in America*.²⁰⁴ *Boundaries* is almost as much an attack upon what he calls "the new orthodoxy" in American legal historical thought²⁰⁵ as it is a panegyric on White's book. Interesting as much of *Boundaries'* analysis is, it displays a strong reactive pattern. Thus:

In recent years, the world of American legal historiography has be-

Polity: The Logic of American Constitutionalism, 76 AM. POL. SCI. REV. 34 (1982). For criticisms of this attempt to apply "deconstruction," see Kurland, *supra* note 193; Fiss, *supra* note 193.

202. Useful discussions of the structuralist and post-structuralist trends in literary interpretation and related interpretation in the humanities and anthropology include: T. HAWKES, *STRUCTURALISM AND SEMIOTICS* (1977); F. JAMESON, *THE PRISON-HOUSE OF LANGUAGE: A CRITICAL ACCOUNT OF STRUCTURALISM AND RUSSIAN FORMALISM* (1972); E. KURZWEIL, *THE AGE OF STRUCTURALISM: LEVI-STRAUSS TO FOUCAULT* (1980) (especially the essays therein entitled *Hermeneutics and Structuralism* and *Literary Structuralism and Erotics*); P. PETTIT, *THE CONCEPT OF STRUCTURALISM: A CRITICAL ANALYSIS* (1975); see also H. GADAMER, *PHILOSOPHICAL HERMENEUTICS* (D. Linge ed. 1976).

I find it hard to resist concluding that most of the legal scholars' and political scientists' "importing" of structuralist, post-structuralist, and particularly deconstructionist analytic modes into constitutional interpretation look more like capitalizations on those imports' capacity to bedazzle in aid of constitutional noninterpretivism than like genuine analytic advances. Conspicuously absent so far is any serious reckoning with discussions of the shortcomings of such analytic modes in the disciplines where they originated. Among the critiques of deconstruction in literary analysis, see DONAGHUE, *Deconstructing Deconstruction: Review of Harold Bloom, Paul de Man, Jacques Derrida, and J. Hillis Miller*, *Deconstruction and Criticism*, N.Y. REV. BOOKS, June 12, 1980, at 37 (de Man comes in for particularly strong criticism); Graff, *Fear and Trembling at Yale*, 46 AM. SCHOLAR 467 (1977) (attacking Yale English faculty, leaders of American post-structuralist movement, for advancing a "no-fault" theory of interpretation); Kenner, *Decoding Roland Barthes*, 261 HARPER'S 68 (Aug., 1980). The reader who shares the concern of Fiss, see Fiss, *supra* note 193, with where deconstruction might lead in constitutional interpretation might profitably examine H. BLOOM, *THE BREAKING OF THE VESSELS* (1982).

203. Teachout, *Boundaries of Realism*, 67 VA. L. REV. 815 (1981).

204. G. WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* (1980).

205. Teachout, *supra* note 203, at 819.

come deeply divided over the question of how the basic patterns of American legal historical experience ought to be viewed. During the seventies there emerged a "new school" of American legal historians who reject what they call "the conservative tradition" in American legal historiography and advance in its place an alternative historiography centered in and structured by ideological theory. Because of its doctrinaire character, this new historiography has come to be regarded as "the new orthodoxy" in American legal historical thought.

The central thrust of the new historiography is its attack upon . . . classic liberalism. According to the new orthodoxy, a culture based on liberal premises is destructively competitive, individualistic, and legalistic. The primary task of the new historian, accordingly, is to write revisionist history that "demonstrates" the corrupting and disintegrating tendencies of liberalism. Professor Horwitz's recent *Transformation of American Law*, for example, can be read as an attempt to demonstrate how . . . a world of simple communal justice was transformed into one dominated by legalism, manipulation, and greed. Against this unhappy picture of liberalism and its consequences, the new orthodoxy holds out an alternative vision of society based on "communitarian" principles.²⁰⁶

In my judgment, this description of the state of affairs in current American legal history contains three major flaws.

First, unless I utterly misapprehend the distribution of political philosophy and analytic proclivity among the more research-active members of that learned field (going, for example, by the tenor of papers, commentaries, and questions at the annual meetings of the American Society for Legal History), at most a tiny minority of those members write or speak as though they think their central objective is attacking classical liberalism *or* demonstrating its corrupting and disintegrating tendencies. Nor do many appear to me to be ideologues believing in a bygone world of simple communal justice or even thinking about alternative visions of future society based on "communitarian" principles. Far more than being deeply "anti-law," a charge Teachout elsewhere amplifies,²⁰⁷ the great majority of

206. *Id.* at 819-20 (footnotes omitted).

207. See Teachout, *Light in Ashes: The Problem of "Respect for the Rule of Law" in American Legal History*, 53 N.Y.U. L. REV. 241, 244-47, 272-78 (1978). Presser, *Legal History or History of the Law*, 35 VAND. L. REV. 849, 857-68 (1982), offers another way of dividing up recent American legal historical scholarship, into four discernible schools: (1) conservative, adopting "the notion that law has followed an orderly evolution according to fixed intellectual principles," *id.* at 857; (2) "the Wisconsin School," viewing "economic needs as the primary determinants of law," *id.* at 858; (3) the "radical transformation school," also economically focused but "reject[ing] some of the relatively benign implications of the Wisconsin school's historiography," *id.* at 859; and (4) a "heroic school" which "can be likened to Elizabethan tragedy or Greek mythology because it focuses on great men of the law," *id.* at 863. Presser's divisions have the advantage of being less "alarmist" than Teachout's perceptions. But I think they are too simple, leaving out a considerable amount of legal historical scholarship that doesn't pigeonhole so readily, finding substantial schools where at most there may be enough scholars to form a transitory one-room schoolhouse, and putting certain scholars where they

legal historians strikes me as eminently enamored of law — especially its most antiquarian obscurities. Indeed, Professor Teachout's list of radicals is barely enough for a "teach-in": "The leading representative of the new school is Professor Morton Horwitz of Harvard Law School."²⁰⁸ Teachout finds that Horwitz's themes are also expressed by Nelson, Unger, Levinson, and Tushnet.²⁰⁹ That's five. Given my lack of conviction that Sanford Levinson and Roberto Mangabeira Unger are primarily legal historians, I am constrained to think that the "new orthodoxy" has come to be regarded as such mainly in Professor Teachout's head. I suspect that the Church of England has at least as good a chance of being reestablished in Virginia as Teachout's neo-orthodoxy has of coming to be so regarded generally among American legal historians.

A second major defect in Teachout's description of the state of affairs in American legal history is that the members of this none-too-numerous band of "neo's" disagree among themselves. The third and most important defect in Teachout's position is that it reaches, albeit via a different route, an intellectual station-stop uncomfortably like that of Judge Posner. It wants to get those "coming from the North" off the train in one lumpy group, and to send the "neo-orthodox" packing back up North. Quite apart from the circumstance that so doing reminds me uncomfortably of the antebellum Southern solution for dealing with visiting abolitionist dignitaries, I would like to hear more precisely what each of these "neo-orthodox" scholars has to say, and why.

Having said this much, I shall relegate most of the political science example to the footnotes and to another occasion, pausing only to declare that roughly a decade and a half ago there erupted in political science a normative cry against the dominant pluralist description of the distribution of American political power. I have in mind the "non-decisionmaking" critique of American pluralism.²¹⁰ Succinctly put, that critique argued that a prime characteris-

don't really fit. Robert Cover's *Justice Accused* (1975) and Grant Gilmore's *The Ages of American Law* (1977) don't really measure up to Elizabethan tragedy or Greek mythology; nor do I think Cover is so simplistic as to view Lemuel Shaw and his legal decisions as wholly independent "of the economics of his time or . . . a particular legal tradition . . ." Presser, *supra* at 863. Presser's approval of Teachout's judgment that "the writers in this school are not really generating historical scholarship . . . [but] producing literature," *id.* at 864, is a bit unkind both to these legal historians and to writers of literature.

208. Teachout, *supra* note 203, at 819 n.17.

209. *Id.*

210. See Bachrach & Baratz, *Two Faces of Power*, 56 AM. POL. SCI. REV. 947 (1962); Bachrach & Baratz, *Power and its Two Faces Revisited: A Reply to Geoffrey Debnam*, 69 AM. POL. SCI. REV. 900 (1975); see also Bachrach & Baratz, *Decisions and Nondecisions: An Analytical Framework*, 57 AM. POL. SCI. REV. 632 (1963).

tic of American politics was a pattern of elites keeping really pressing problems inherent in post-industrial American democracy off the political agenda by controlling what was, and what was not, "legitimate" to raise in government fora.

Without declaring my position on the "non-decisionmaking debate," I think it pertinent to stress one similarity and one difference in the treatment that political science accorded its "visitation from the North" and the treatment that the law's method of analysis has accorded similar visitations. The similarity is that both approaches were rejected by the dominant school of analysis.²¹¹ The difference is that in political science, the "dissident tendency" got its "day in court," including a detailed assessment and rebuttal. Succinctly put, the "non-decisionmaking" critique was "sent packing up North" by the intellectually respectable technique of arguing its methodological deficiencies.²¹² But in constitutional law and, to a lesser extent, in legal history, the "dissident tendency" has so far been more often met with "open pages for expression" than with painstaking assessment.

The remainder of this Article is devoted to such an assessment. Such an undertaking is required not only by the "civil obligation" of giving a response, but also by the very uncertainties about the purposes and effectiveness of legal research and teaching recently expressed by such "establishment" representatives as Harvard University President Derek Bok, as well as others who, along with Posner, were heard at the Yale Law School Symposium.²¹³ The

211. If we go by the content of articles in major political science journals, the nondecisionmaking critique had been quashed by the mid-70s.

212. See, e.g., Wolfinger, *Nondecisions and the Study of Local Politics*, 65 AM. POL. SCI. REV. 1063 (1971); Frey, *Comment: On Issues and Nonissues in the Study of Power*, 65 AM. POL. SCI. REV. 1081 (1971); Wolfinger, *Rejoinder to Frey's "Comment"*, 65 AM. POL. SCI. REV. 1102 (1971); see also Debnam, *Nondecisions and Power: The Two Faces of Bachrach and Baratz*, 69 AM. POL. SCI. REV. 889 (1975); Debnam, *Rejoinder to "Comment" by Peter Bachrach and Morton S. Baratz*, 69 AM. POL. SCI. REV. 905 (1975).

213. Bok's 1981-1982 Report to the Harvard Overseers dealt with problems of legal education at Harvard in the 1980s. See Bok, *A Flawed System*, 85 HARV. MAG. 38 (1983). For further discussion of these problems, see Stone, *From a Language Perspective*, 90 YALE L.J. 1149, 1149 (1981) ("My thesis is that law scholarship . . . is fragmented and drifting." Stone argues that research into law as language would give law a clearer sense of purpose.); see also Fiss, *The Varieties of Positivism*, 90 YALE L.J. 1007, 1007, 1016 (1981) ("Positivism is an idea that has generated a great deal of confusion . . . Stumped, especially by these papers, Professor Robert Gordon announced that he had 'come to the conclusion that a positivist is someone who sounds very positive.'") ("The law, as opposed to history, is lacking a literature on its scholarship. . . . The hour is late . . ."); Fletcher, *Two Modes of Legal Thought*, 90 YALE L.J. 970, 970 (1981) ("We have no jurisprudence of legal scholarship. . . . Yet we reflect little about what we are doing when we write about the law."); Michelman, *Politics As Medicine: On Misdiagnosing Legal Scholarship*, 90 YALE L.J. 1224, 1124 (1981) ("Here it is, Sunday morning. Something . . . makes me think it must be my role to counter Mark Tushnet's message of despair with the message of hope—and to wrestle with Alan Freeman for the soul of Paul

need is also suggested by the differences in the contemporary states of two "law-and" areas of inquiry — "law-and-history" (robust and expansive) and "law-and-political science" (much less robust, even in the doldrums between normative analysis and the search for that in the law which is both distinctively political and readily quantifiable).²¹⁴ More broadly, this assessment is called for by the conditions of the larger American polity — especially the stasis or retrogression of social and economic goods distribution characterizing the past few years, the Democratic opposition's extraordinary inability to mount a coherent critique of this stasis or retrogression, and the Administration's seeming inability to do more in foreign relations than to separate the country further from Western Europe

Brest. The problem posed to us by Professor Tushnet is the failure of contemporary legal scholarship, as he sees it, to participate significantly in what he takes to be the one true intellectual calling of our times"); Shapiro, *On The Regrettable Decline of Law French: Or Shapiro Jettit Le Brickbat*, 90 YALE L.J. 1198, 1198 (1981) ("Professor Stone's call . . . may well be the first trumpet call of an essentially reactionary movement").

214. Defending fully the proposition that law-and-political-science is in the doldrums would require an essay in itself. That is not possible here. Certain phenomena evident at the 1982 American Political Science Association and the 1983 Western Political Science Association annual meetings, however, might be considered at least indicative. Each meeting featured panel discussions that revolved around questions such as "Where are we going now?" and "Are we really scientists of the law's processes?" Those discussions also betrayed unease as to how political scientists specializing in law could become more central to the "discipline" of political science — that is, less peripheral compared to, for example, students of voting or of legislative processes. Arguably, the public law speciality in political science continues to suffer to a peculiar degree from identity-anxiety and a perceived failure to attain the "science status" sought by some. Be that as it may, it is interesting that only one of the panelists at the W.P.S.A. meeting continued to speak in the optimistic behavioral terms common in the 1960s. It is also indicative that, after a generation of seeking independence, the references to discussion-relevant articles in the five W.P.S.A. papers came by a ratio of about three-to-one from law reviews rather than political science journals. See *Whither Political Jurisprudence?*, W. POL. Q. (forthcoming, Dec. 1983) (collecting the W.P.S.A. papers as a symposium).

The A.P.S.A. convention papers showed sufficient diversity on the subject of public law's methodological paradigm to establish one "negative pregnant" — that if such a paradigm is one necessary condition of a scientific speciality, public law just is not in the ballpark. Compare L. Carter, *Models of Public Law Scholarship and Their Payoffs* (Sept. 2-5, 1982) (unpublished paper delivered at A.P.S.A. annual meeting), with C. Tate, *The Development of the Methodology of Judicial Behavior Research: A Historical Review and Critique of the Use and Teaching of Methods* (Sept. 2-5, 1982) (unpublished paper delivered at A.P.S.A. annual meeting). Carter maintains that "[o]f the several current political science uses of the label 'public law,' the most inclusive (and the one most frequently used) refers to no coherent theory or body of knowledge about either law or the public." L. Carter, *supra* at 3. Generally, his essay takes a line somewhat analogous to that of Stone, arguing for a "new public law" concerned with "how language shapes and limits the perception of normative issues" *Id.* at 11. Tate, on the other hand, is still very positive about positivist science's possibilities. Methodological deficiencies, rather than something amiss in the scientific undertaking itself, explain for Tate the sub-optimal progress of political-science-in-law. See also, B.C. Canon, *Studying the Impact of Judicial Decisions: A Period of Stagnation and Prospects for the Future*; D.M. Provine, *Research on the Judicial Process, 1970-82: What Have We Learned?*; A. Villmoare, *What Is the Conceptual Future of the Analysis of Public Law? One Perspective on the Questions* (all presented at the A.P.S.A. meeting; Canon the most critical as to disciplinary progress, Villmoare "fishing" for useful approaches from other disciplines' methodologies and conceptualizations, Provine less pessimistic but well short of positive positivism).

and to re-stage the Vietnamese peasant-shooting enterprise in Central America. All of these factors argue for a "critical liberal" examination of the insights, if any, that the "Critical Legal Studies Movement" offers in examining the role of law in shaping, or misshaping, the American polity's destiny and the life-situations of its members.

So, deferring for now whether we would be better advised "to call on God to speak"²¹⁵ or to "find the mind's opportunity in the heart's revenge," rather than standing "in tedious embarrassment before cold altars,"²¹⁶ let us play with fire a bit.

C. *Marxist Language as a Barrier to Understanding, and Tushnet's Maximum and Minimum Goals for a Marxist Theory of American Law*

Of course, Tushnet is not really coming at us from the (non-Siberian) North. That was a red herring. But neither is he quite coming at us from the People's Cossack-dancing revels in the birch forests around Moscow or from the Central European tradition of Dracula-like pointy-headed Marxist intellectuals out to sap the vitality of the monopoly-capitalist Western European and North American bodies politic.²¹⁷

Any American intellectual who is seriously committed to socio-economic reform and who organizes his critique of American folk-and corporate-ways around a Marxist framework of analysis runs great risks. I do not mean, however, to doubt that one can critique American trends with impunity or even reward. One can. There are indeed at least eight safe ways within the domain of American legal scholarship to critique American ways. Starting with the most spacious, one may pen a philosophical treatise at a level of abstraction that avoids having clearly to resolve whether its distributive judgments are compatible with socialism or capitalism.²¹⁸ Second, one may pen constitutional treatises that make straight (or at least show

215. After showing conclusively, at least in the eyes of Tushnet, the pitfalls of liberalism, Roberto Mangabeira Unger concludes *Knowledge and Politics* with the words (he likes quasi-literary, post-analytic flourishes): "Desirous of faith, touched by hope, and moved by love, men look unceasingly for God. . . . But our days pass, and still we do not know you fully. Why then do you remain silent? Speak, God." R. UNGER, *KNOWLEDGE AND POLITICS* 295 (1975).

216. Unger, *The Critical Studies Movement*, 96 HARV. L. REV. 561, 675 (1983) (where Unger gets meta-analytic again).

217. Note that I do not say "bodies economic." Clearly he would like to change substantially at least the distribution of economic goods.

218. See B. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980); J. RAWLS, *A THEORY OF JUSTICE* (1971).

the way to making more straight) the Supreme Court's way through the political wilderness.²¹⁹ This approach usually avoids altogether the question of whether its distributive prescriptions are compatible with socialism or capitalism.

The third safe method is to compose historical treatises that plainly disapprove of some past American evil and that contain vaguely well-intentioned implications for current American justice and justices;²²⁰ this approach also avoids questions of compatibility. Alternatively, there is a fourth approach: writing casebooks that seek to rectify judicially wrought (or aided) wrongs by, variously, locating the source of primal error in some unfortunate formalist law professor who, long deceased, cannot defend his failure to bring about legal coherence or social justice;²²¹ anticipating improvement in solving a core problem of scarce resources by increasing judicial limitation of state power in favor of national power;²²² or imbuing the student simultaneously with the complexity of constitutional questions and the desirability of measured legal-doctrinal change as the way to bring about social, economic, and political progress.²²³

Fifth, one can "critique" by documenting alarming changes in the "who owns what" of the American economy, or "who damages what" of American nature, and suggesting "cures" that no political majority is likely to take seriously. A sixth option is to write articles demonstrating that, while not everything is improving, at least the Court's handling of a particular invidious distinction may be. Seventh, the critic can write articles that support affirmative action, or eighth, produce articles showing that the Burger Court has reached a sensible middle-of-the-road disposition of one or more problems of late-industrial capitalism, such as the terms under which middle-class public employees work or are fired.²²⁴

219. See J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980); J. ELY, *DEMOCRACY AND DISTRUST* (1981); L. TRIBE, *supra* note 183; see also Easterbook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982) (useful analysis of ways in which, given that the Supreme Court consists of nine persons who often disagree with each other in their value priorities, it is and is not sensible to criticize the Court).

220. See, e.g., R. COVER, *JUSTICE ACCUSED* (1975). *Justice Accused* has become a bit the "darling" of law professors skimming the law of slavery topic (somewhat less so of legal historians burrowing into it). For a rare adverse judgment by a lawyer, see Tushnet, Book Review, 20 AM. J. LEGAL HIST. 168 (1976).

221. See R. CRAMTON, D. CURRIE & H. KAY, *supra* note 32, at 6 (Joseph Beale takes it on the chin for having tried to solve conflict-of-laws problems by "territorializing" them).

222. See, e.g., G. COGGINS & C. WILKINSON, *FEDERAL PUBLIC LAND AND RESOURCES LAW* (1981).

223. See generally G. GUNTHER, *CONSTITUTIONAL LAW: CASES AND MATERIALS* (10th ed. 1980).

224. See Simon, *Liberty and Property in the Supreme Court: A Defense of Roth and Perry*, 71 CALIF. L. REV. 146, 192 (1983).

Why should Professor Tushnet find the breadth of all this critical room insufficient? Why should a Marxist critique be necessary for him? After all, if none of these methods is sufficient, he could busy himself with what at least one legal scholar takes to be the central problem of contemporary constitutional scholarship — the adequacies and inadequacies of “interpretivist” versus “non-interpretivist” approaches to constitutional decision making.²²⁵ Why won’t this do? The answers to these questions are important — if (though not) only because of Tushnet’s analytic uniqueness among Marxist Anglo-American legal scholars.

A common characteristic divides these scholars from Tushnet. The characteristic is that they take Marxist analysis very seriously in an “interpretivist sense.” Either they do so in a fundamentalist fashion, and quite illiterately,²²⁶ or they do so in a less fundamentalist — and more literate — manner. In this the members of the more literate sub-group have much in common with the best Marxist historians, such as Eugene Genovese, who, whatever else they may be, are neither fundamentalist nor lacking in linguistic felicity, but who think that the “source” is interpretively crucial to an adequate analysis. For Tushnet, the role of Marx/Engels “scripture” is much less clear, as is the appropriate maximum goal of a Marxist analysis of American law. Tushnet, in other words, waffles on whether a powerful Marxist analysis of law is really possible. In an odd sense, that is why his analysis ought to be taken seriously and ought to be carefully scrutinized. What makes the examination of Tushnet’s work interesting is, in large measure, his oscillation among three positions — whether Marxism is capable of a “strong” analysis of American law (one covering both the specific and the general characteristics of that law), or whether it can only hope to attain a “weak” analysis (one embracing general trends but having little or nothing to say about particular cases or doctrinal devolutions), or whether, yet more weakly, Marxism is merely useful as an existential “anti-” position (one more valuable for affirming differences from “establishment” analyses than for describing general or specific propositions about the path of American law).

In addition, Tushnet exhibits at least three Marxist faces whose alternating appearances in various essays make Tushnet’s overall po-

225. See Brest, *supra* note 192; Brest, *supra* note 201; see also Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063 (1981) (arguing that both interpretivism and non-interpretivism are ultimately failures).

226. See, e.g., Hunt, *Dichotomy and Contradiction in the Sociology of Law*, 8 BRIT. J. LAW & SOC. 47 (1981).

sition difficult to grasp.²²⁷ The first "face" is concerned chiefly with assessing, at a fairly high level of abstraction, the value and limitations of Marxist analysis of American law.²²⁸ The second "face" is concerned primarily with using Marxist analysis to critique both conventional liberal American legal scholarship in general and particular issues that such conventional scholarship prominently discusses, such as "Structural Constitutional Review" and "Interpretivism versus Non-Interpretivism."²²⁹ The third "face" is the "legal historical" one. It is concerned both with applying Marxist analysis to nineteenth century American law and with criticizing the shortcomings of conventional liberal and non-Marxist radical essays on that subject.

Beyond the confused situation in which the scattering of Tushnet's analyses across so many essays leaves his readers, there are at least four main barriers to speedy overall assessment. One is contained in what, from the American liberal standpoint, appear as the linguistic peculiarities of Marxist writing — especially the use of certain recurrent "evidence-summing" metaphors with pejorative connotations.

The second barrier springs from the fact that Tushnet's views as to how much specificity and explanatory power can be displayed by Marxist analysis of American law have shifted over time. The third barrier, which is most apparent in his "second face" analyses of post-Realist legal scholarship, is that those analyses merge critical axioms flowing from Legal Realism and from Marxism variously in a sometimes opaque fashion.

227. That is to say nothing of those of his articles that are entirely or almost entirely conventional case or doctrinal discussions. See, e.g., Tushnet, *The Sociology of Article III: A Response to Professor Brilmayer*, 93 HARV. L. REV. 1698 (1980); Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125; Tushnet, *Constitutional and Statutory Analyses in the Law of Federal Jurisdiction*, 25 UCLA L. REV. 1301 (1978); Tushnet, *Constitutional Limitation of Substantive Criminal Law: An Examination of the Meaning of Mullaney v. Wilbur*, 55 B.U. L. REV. 775 (1975).

228. This face is manifested chiefly in five essays published or written since 1978. See Tushnet, *A Marxist Analysis of American Law*, in MARXIST PERSPECTIVES 96 (1978) [hereinafter cited as Tushnet, 1978 MARXIST PERSPECTIVES]; Tushnet, Book Review, 7 BRIT. J. L. & SOC. 122 (1980) (reviewing M. CAIN & A. HUNT, MARX AND ENGELS ON LAW (1979), P. HIRST, ON LAW AND IDEOLOGY (1979), and C. SUMNER, READING IDEOLOGIES (1979)) [hereinafter cited as Tushnet, BRITISH REVIEW]; M. Tushnet, Marxism as Metaphor (unpublished paper, forthcoming in 1983) [hereinafter cited as Tushnet, 1983 Marxism as Metaphor]; M. Tushnet, Marxism and Law (unpublished paper, forthcoming in 1983) [hereinafter cited as Tushnet, 1983 Marxism and Law]; M. Tushnet, Is There A Marxist Theory of Law? (Sept. 2-6, 1981) (paper presented at Annual Meeting of the American Society for Political and Legal Philosophy) [hereinafter cited as Tushnet, 1981 Marxist Theory].

229. See Tushnet, *Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TEX. L. REV. 1307 (1979). This article also contains a discussion of what a Marxist theory of law ought to be about. See *id.* at 1346-58.

The fourth barrier is something of an "evidentiary analogue" to the third, but it arises in the area of nineteenth century American legal history. Part of the problem is suggested by recalling Alan Watson's argument that some of the peculiarities of Southern slave law could be explained in terms of the natural legal evolution of any slave society and thus were understandable without recourse to what he took to be Marxism's not very insightful insights into the antebellum South. More broadly, the problem relates to an observation by Frederic Jameson quoted near the outset of this Article. Does, to state it somewhat differently, Marxist dialectic's focus upon the historiographic equivalent of twentieth century physics' "wave theory" explanations of "light" merely amount to a vaguer and more cumbersome mode of explanation of history than Anglo-American empirical history's focus upon (to continue the analogy) a "particle theory" of historical individuals' activities? Or are Marxism's different insights somehow "worthwhile"? Lastly, in this connection, are the "canons of sufficient evidence" properly thought to be the same when judging between the two historiographical approaches: does Ockham's razor properly apply to both?²³⁰ In the remainder of this Part we shall consider the first two of these four barriers.²³¹

I wish to deal with the first of these difficulties — Marxism's linguistic peculiarities — in a two-step fashion. First, we must bring to the surface our (bourgeois) sense of objection to some common Marxist terms by simply lining them up. The second step is to see whether we can profitably "de-fang" them with whimsy yet leave them with some explanatory value by turning them into non-Marxist or "less Marxist" phrases with sense-meanings apprehendable from a liberal perspective.

I choose selectively from a long list of potentially "annoying" Marxist words and phrases by limiting the examples to a small sample drawn mainly from Tushnet's writings and from three other recent Marxist essays on law.²³² Here is a short list, with "de-fanged" substitutes:

230. Another radical legal historian puts the point well:

One cannot repeat too often that Marx's dialectical approach involves the rejection of a familiar bourgeois way of looking at the world in favor of the development of a more comprehensive, qualitative, substantive approach which, among other things, disavows the liberal fact/value distinction and the liberal mode of definition-by-isolation.

Holt, *Morton Horwitz and the Transformation of American Legal History*, 23 WM. & MARY L. REV. 663, 701 n.133 (1982).

231. The other two require a separate essay in themselves.

232. Abel, *A Critique of American Tort Law*, 8 BRIT. J. LAW & SOC. 199 (1981); Balbus, *Commodity Form and Legal Form: An Essay on the "Relative Autonomy" of the Law*, 11 LAW & SOC. REV. 571 (1977); Hunt, *supra* note 226.

"Socialist camp," "imperialist camp," "death agony of capitalism." The first two are annoying to some of us who associate "camp" fondly with childhood summers but who don't want to be thought of as having nothing better than army cots to sleep in the rest of the year. "Death agony" seems a bit overdrawn; possibly capitalism is better than Italian opera stars at lengthy death scenes. Let's say "Marxist-Leninist countries," "democratic-pluralist countries," and "bad day on Wall Street."

"Ruthless imperialist beast," "jackal legal henchmen," and "paper tiger." Let's say "that nice David Rockefeller," "the distinguished law-and-economics professors," and "*papier mâché* pussycat."

So much for the general nouns and noun-phrases of Marxist name-calling. What about verbs?

"Emanate," "mystify," "generate," "be implicated in," "exploit," "oppress." The first three only suggest confusion, while the last three imply guilt. It is, oddly perhaps, easier to defang the latter trio — respectively, "be functionally related to," "give foreign aid to assist in the economic development of," and "anti-inflationary wage-restraining." The first three verbs are typical analytic conjunctures linking fairly reified abstract nouns and noun phrases — for example, "Capitalism generates liberal ideology." We will have to defang them as they come along individually. What of Marxist legal analysis terms-of-art?

"Legal fetishism," "fetishism of commodities." These are particularly irritating, but more for Freudian than Marxian reasons. After all, Karl preceded Sigmund. "Characterized by greater concern with the rule of law than with socioeconomic inequalities," and "being more concerned with 'keeping up with the Joneses' than with the human costs of work-conditions," will have to do as restatements.

"Internal contradictions of liberal law," "economic infrastructure versus legal superstructure," "hegemony of liberal legal ideology," "dilemmas of liberal-capitalist legal theory," and "formal legal reflections of ruling class interests." These are all particularly irritating to lawyers and legal scholars. Metaphoric animal names may not break bones. Indeed, they're a bit funny — though Marxist-Leninists intellectuals, who almost uniformly seem to be below the tenth percentile in capacity for humor, often do not realize this. But these phrases all go straight to our sense of intellectual independence. They put us in a kind of Platonic cave of legal analysis, implying that we labor long and hard with mere legal shadows of what really matters intellectually. The implication that we do not know that dilemmas and contradictions suffuse even our most hard-headed thinking is also

disconcerting. Moreover, they defy general defanging. Again we shall have to take them up as we come to them.

If it is important in understanding contemporary American Marxist analysis of law not to be put off at the start by some of the general phraseology I have just lampooned, it is *very* important to realize that as that analysis emerged during the late 1970s and early 1980s, its more sophisticated practitioners, including Tushnet, put considerable distance between their view of the relationships of law and economy, on the one hand, and a simple determinist view of those relationships, on the other. Thus, to offer an illustration "outside of" Tushnet, Balbus has outlined the essentials of his own theory of law. He states that:

This theory . . . entails a simultaneous rejection of both an *instrumentalist* or reductionist approach, which denies that the legal order possesses any autonomy from the demand imposed on it by actors of the capitalist society in which it is embedded, and a *formalist* approach, which asserts an absolute . . . autonomy of the legal order from this society.²³³

Balbus goes on to argue that formalist analysis and reductionist, instrumentalist analysis are equally unsatisfactory. Formalism's focus on the specifics of the forms of American law produces elegant descriptions of a closed, wholly autonomous legal system but avoids the knotty problem of conceptualizing and locating the relationships between those forms and the "capitalist whole of which [such forms are] a part."²³⁴ Both "pluralist . . . [and] crude-Marxist"²³⁵ instrumental approaches misconstrue the law "as a mere instrument or tool of the will of dominant social actors."²³⁶ Consequently, such instrumental approaches neither explain why the forms of law in a particular society are as they are, nor ascertain, with respect to a capitalist economy, how those forms link to "the overall requirements of the . . . system."²³⁷

Now that is something that any halfway critical liberal or conservative could have said.²³⁸ It explains, incidentally, why I earlier

233. Balbus, *supra* note 232, at 571 (emphasis in original). Note the implicit separation of "actors" from the status of mere unthinking "robots" of the economy's dictates.

234. *Id.* at 572.

235. *Id.* at 571.

236. *Id.*

237. *Id.*

238. Cf. Gordon, Gordon, *Historicism in Legal Scholarship*, 90 YALE L.J. 1017 (1981); *Introduction: J. Willard Hurst and the Common Law Tradition in American Legal Historiography*, 10 LAW & SOC. REV. 9, 10-11 (1975) (comparing American legal history concerned with the "inside the black box" of the law's forms with American legal history concerned with the "external relations" of the law).

said that Teachout's lumping of persons such as Tushnet and Horwitz into a "neo-orthodox" school won't do,²³⁹ and why "not-so-crude" Marxists like Tushnet have attacked both Horwitz's and Friedman's "radicalism."²⁴⁰ An interesting footnote in Balbus's argument is worth pausing on for its equation of pluralist and "crude-Marxist" legal analysis.

Despite their obvious opposition, there is no *theoretical* difference between a Pluralist and an Instrumentalist-Marxist approach to law. Both bypass entirely the problem of the form or structure of the legal order in order to conceive it as a direct reflection of consciously articulated and organized pressures. Thus the difference between them is merely empirical: Pluralists deny that there is a systematic bias to the interplay of pressures; Instrumentalist Marxists argue that this interplay is dominated by specifically capitalist interests.²⁴¹

Very similar judgments as to the insufficiency of crude instrumentalist Marxism are prominent in the writings of other Marxists. Closely related are two other characteristics of such writing. One characteristic is the rejection of an approach that tries to bring order into all of Marx's and Engel's various legal writings, followed *either* by an attempt to make sense of the literal and implied meanings of certain restricted "chunks" of text²⁴² *or* by giving up the exegetical task entirely as not worthwhile. The latter, as we have already noted, is Tushnet's mode.²⁴³

The other characteristic is an attempt to construct something like

239. See text accompanying notes 203-09 *supra*.

240. See Tushnet, 1978 MARXIST PERSPECTIVES, *supra* note 228, at 106; Tushnet, *Perspectives on the Development of American Law: A Critical Review of Friedman's "A History of American Law"*, 1977 WIS. L. REV. 81; see also Tushnet, *The Dialectics of Legal History*, 57 TEX. L. REV. 1295 (1975) (critical of Teachout's "hero" — G. Edward White). But see Holt, *supra* note 230 (Marxist defense of Morton Horwitz).

241. Balbus, *supra* note 232, at 571 n.1; cf. Freeman, *Truth and Mystification in Legal Scholarship*, 90 YALE L.J. 1229, 1232 (1981) (seeing law as grounded in its social setting "can lead to explanatory models as divergent as conspiratorial Marxist instrumentalism and liberal pluralist instrumentalism. That approach seems to underestimate the importance of law and legal ideology, to reduce it to a reflexive fact of social life, to demean the human activity associated with legal consciousness . . ."). The latter clause, incidentally, may explain partially the unpopularity among lawyers of behavioral political science's legal analysis.

242. As, for example, Gary Young's exegesis of "only Marx's mature writings." Young, *Marx on Bourgeois Law*, in 2 RESEARCH IN LAW AND SOCIOLOGY 133, 134 (1979).

243. See Tushnet, BRITISH REVIEW, *supra* note 228, at 123. In discussing M. CAIN & A. HUNT, MARX AND ENGELS ON LAW (1979), Tushnet notes:

[The authors] have expended enormous effort in discovering and collecting the fugitive writings of Marx and Engels that deal with law. . . .

This method of presentation . . . establishes that exegesis cannot give us a Marxist theory of law. The texts will support any position from reductionism to something just short of liberalism. Nor is it the case that we can distinguish between an early Hegelian Marx and a mature *post-coupure* Marx, or between Marx as analyst of general structures and Marx as analyst of particular conjunctures. The various inconsistent approaches simply coexist.

Tushnet, BRITISH REVIEW, *supra* note 228, at 123; see also Tushnet, 1981 Marxist Theory,

a "legitimizing pedigree" for contemporary noninstrumentalist Marxist analysis by reexamining the work, not of Marx and Engels themselves, but rather of, typically, early twentieth century Marxists — especially the Austrians Karl Renner and Rudolf Hilferding and the Russian E.B. Pashukanis.²⁴⁴ Pashukanis's rejection of both formalism and "the vulgar materialism which was becoming dominant in the USSR in his day"²⁴⁵ differs, it is said, from Renner's neo-Kantian conception of the scientific method and concurrence with Hans Kelsen's formalist view of law as an autonomous sphere. Yet both views legitimize "non-vulgar" late twentieth century Marxist analyses of law.

However, such legitimation of current nonfundamentalist approaches as genuinely Marxist does not lead to quick concurrence as to "Shto Sdyelat?"²⁴⁶ The uncertainty is evident not only among scholars seeking to apply Marxist analysis to American law but even *within* the work of the scholar with whom we are here most concerned. Furthermore, the shift in Tushnet's views developed over a very short span of time. Consider the variation between late-1970s and early-1980s "Tushnetian Marxist" legal analysis.

Tushnet's 1978 essay, *A Marxist Analysis of American Law*,²⁴⁷ lays out quite clearly a not unambitious program as to what an adequate Marxist theory of American law would entail. Basically, such a theory would have to undertake three tasks. First, it "must show the material basis for both the existence of a legal form in capitalist society and for the specific ideological content of that form" ²⁴⁸ In other words, without falling into "the reductionist trap of viewing the form and content of the law as direct expressions of the interests, narrowly defined, of the bourgeoisie,"²⁴⁹ it must explain: (a) why there is a rule of law in capitalist polities at all; and, (b) why the legal rules in such polities prioritize certain values but not others. For example, it should be able to explain why nineteenth century American law enforced harsh contracts rationally entered into rather than, as at an earlier phase, adjusting the contracts' terms to reach more

supra note 228, at 2 ("I will avoid exegetical exercises . . . partly because the texts make exegesis futile . . .").

244. See P. HIRST, ON LAW AND IDEOLOGY 106-22, 122-26 (1979) (discussing Pashukanis and Renner).

245. *Id.* at 107.

246. This is a transliteration of the title of Lenin's famous essay — in English, *What is To Be Done?* See V. LENIN, *What is to Be Done*, in COLLECTED WORKS 347 (V. Jerome ed. 1961).

247. Tushnet, 1978 MARXIST PERSPECTIVES, *supra* note 228.

248. *Id.* at 96.

249. *Id.*

equitable results,²⁵⁰ and why twentieth century American constitutional law arguably carries equality of access to travel and entertainment accommodations well beyond the Framers' original intent, but makes no such advances with respect to equality in school resources or in effective rights to settle in choice neighborhoods.²⁵¹

Moreover, the explanation of why the law thus favors formal rights and liberty over substantive concern for lessening disparities in "real" capacity to exercise such rights cannot be adequate for the Marxist, if it is limited to exercises in "mere" liberal intellectual history, "mere" pluralist political science, or to "mere" philosophic analysis of the content of talismanic review-triggering clauses such as "equal protection of the laws." Accordingly, the preference for "negative liberty"²⁵² over "positive equality" could not be adequately "explained" in terms, for example, of the Framers' concepts of a nonarbitrary form of government or in terms of successive generations' evolving conceptions²⁵³ of liberty, contractual fairness, and the like. It is equally insufficient, from the Marxist vantage point, *either* to "explain" judicial rejection of constitutional arguments that would equalize school resources or reduce exclusionary zoning of suburbs by referring only to pluralist accounts of the liberal or conservative mind-sets of the judges, *or* to "explain away" the substance of constitutional "trigger-clauses" by arguing that they are formally empty.²⁵⁴ Rather, an adequate Marxist explanation would need to relate these judicial doctrines and the ideas and politics underlying them to structural economic facts of American life.

250. If, in fact, the earlier era was properly so characterized. For argument that Horwitz and others err on this, see Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 YALE L.J. 1717 (1981); Schwartz, *The Vitality of Negligence and the Ethics of Strict Liability*, 15 GA. L. REV. 963 (1981). For a defense of Horwitz, see Holt, *supra* note 230, at 667-70.

251. See the conflicting majority and minority opinions in *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1972).

252. See I. BERLIN, *TWO CONCEPTS OF LIBERTY* (1958). I have changed "positive liberty" to "positive equality" deliberately.

253. For a useful, but problematic, distinction between "concepts" (generalized ideas about X and Y — e.g., free speech and right to counsel — that were "put once and for all" in the Constitution by the various Framers and that remain constant) and "conceptions" (more specific ideas of same that may evolve from generation to generation), see R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 134-36 (1978).

254. It is also insufficient to explain that the use of terms like "liberty" or "equality" is intellectually or politically confusing. See Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982) (elegant argument to that effect); Westen, *On "Confusing Ideas": Reply*, 91 YALE L.J. 1153 (1982); Westen, *The Meaning of Equality in Law, Science, Math, and Morals: A Reply*, 81 MICH. L. REV. 604 (1983). But see Burton, *Comment on "Empty Ideas": Logical Positivist Analyses of Equality and Rules*, 91 YALE L.J. 1136 (1982); Chemerinsky, *In Defense of Equality: A Reply to Professor Westen*, 81 MICH. L. REV. 575 (1983); D'Amato, *Is Equality A Totally Empty Idea?*, 81 MICH. L. REV. 600 (1983).

Tushnet's second necessary task for a Marxist theory of American law is to "show how the structure of the legal system supports its autonomy from the political and economic structures of capitalism,"²⁵⁵ without regarding that autonomy as absolute. His third necessary task is closely related, giving "content to the idea of the relative autonomy of the law."²⁵⁶

In other words, a Marxist theory needs to explain: (a) what it means to say that the legal system appears to function, in at least some aspects, independently of "economic and political dictates" but less so in other aspects; (b) which are the more, and which the less, apparently independent aspects both of structure and of process; (c) why some aspects push toward functional independence yet others do not; and (d) how and why factors external to the law brake or limit that independence, by making the law's autonomy only "relative," or better (since the word "relative" in non-Marxist language seems to demand a "with respect to what" clause about which Marxist analysis remains vague), "incomplete" or "partial."²⁵⁷

Following a comment concerning the "pernicious reductionism" of Lawrence-Friedman-style legal history,²⁵⁸ Tushnet states quite optimistically that recent Marxist discussions have both "shifted attention to the significance of the legal form itself and provided a solid foundation for a return to . . . analysis of the specific content of the law."²⁵⁹ This view envisages Marxist theory as potentially capable of explaining not merely the *form* of capitalist law — for example, why state-provided welfare "to the dominated classes . . . proceed[s] according to general rules applied by lower-level officials not thought to have substantial discretion."²⁶⁰ It also conceives of Marxist theory as capable of explaining the *content* of that law — for example, why "regulation of collective workers' activity [became] collective bargaining in an essentially contractual framework."²⁶¹

After discussing three possible responses to the Neo-Realist contention that large sectors of the law "which might seem to express the

255. Tushnet, 1978 MARXIST PERSPECTIVES, *supra* note 228, at 96.

256. *Id.*

257. "Partial," of course, has its ambiguities too.

258. The non-Marxist reader should be alerted that the phrase "pernicious reductionism" is used in Marxist prose less to distinguish it from "non-pernicious" or "deft" reductionism (for example, reducing 111111/555555ths to 1/5th) than to differentiate the merely "pernicious" (no evidence of mens rea) from the "heinous" (evidence of mens rea) form of reductionism.

259. Tushnet, 1978 MARXIST PERSPECTIVES, *supra* note 228, at 96.

260. *Id.* at 97.

261. *Id.*

fundamental presuppositions of capitalist society [are in fact] essentially irrelevant to the transactions of capitalists"²⁶² — an attack which, if successful, might undermine any Marxist theory of law — Tushnet goes on to argue that an adequate Marxist theory needs to focus on three issues: (1) how ideologies are generated; (2) whether capitalist material conditions give rise to distinctively capitalist legal forms of ideology; and (3) what the consequences are of "the contradictions inherent in the capitalist mode of production."²⁶³ The essay concludes with brief discussions of, in Tushnet's view, significant but flawed examinations of these issues.²⁶⁴ The details of Tushnet's characterizations of these examinations need not detain us here; the important point involves the scope of the Marxist analytic enterprise contemplated. Tushnet seeks a *general* theory of American law that explains both the form and content of that law as well as how each rests upon a "material basis" that pins down the extent of autonomy in the law, and that, having determined the genesis and operation of capitalist ideology, works out the consequences.

Now let us contrast that fairly tall order with Tushnet's more recent formulations, half a decade later. A fair characterization of Tushnet's more recent position(s) — as laid out particularly in *Is There A Marxist Theory of Law?*, *Marxism as Metaphor*, and *Marxism and Law*²⁶⁵ — is that it recedes substantially from his 1978 position on at least the following scores: (1) the feasibility of a general Marxist theory of American law which explains adequately and systematically both the law's content(s) and its form(s); and (2) in turn, the likely potential scope of Marxist explanation and the satisfactory minimum content of a Marxist theory of law.

At times, indeed, he turns almost puckishly cynical, as when he says: "It may be . . . that to the degree that a theory is distinctively Marxist, it is not a good theory, and conversely."²⁶⁶ Tushnet's non-

262. *Id.* Tushnet is particularly concerned with Stewart Macaulay's studies. See Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963); see also Epstein, *The Social Consequences of Common Law Rules*, 95 HARV. L. REV. 1717 (1982) (challenging the view that common law doctrines may determine significantly the allocation of resources in society).

263. Tushnet, 1978 MARXIST PERSPECTIVES, *supra* note 228, at 101.

264. See Gabel, *Intention and Structure in Contractual Conditions: Outline of a Method for Critical Legal Theory*, 61 MINN. L. REV. 601 (1977) (perceived by Tushnet as demonstrating the potential for using phenomenological approaches in tandem with Marxist analysis); Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976) (perceived by Tushnet as fruitful but incomplete analysis of internal contradictions in legal thought); Unger, *supra* note 184 (same).

265. See Tushnet, 198 Marxism as Metaphor, *supra* note 228; Tushnet, 1983 Marxism and Law, *supra* note 228; Tushnet, 1981 Marxist Theory, *supra* note 228.

266. Tushnet, 1981 Marxist Theory, *supra* note 228, at 15.

Marxist reader could, I think, be pardoned for drawing from this sort of statement the conclusion that the pursuit of a Marxist theory of American law is hardly worth the candle. But the conclusion would be premature. A more cautious, middle-of-the-journey assessment would come in two parts. The first consists in determining the main features of what Tushnet describes in his less throw-in-the-towel moments as a weak or minimum-satisfactory Marxist approach, and to try to account for this particular more-moderate recession from the "1978 high." The second (which we shall defer) is to see to what extent, if at all, it is Marxist theory ("strong" or "weak") that lies at the base of Tushnet's critiques of "main-line" positions in the current debates over constitutional issues, in the scholarship of legal history, and more generally in conventional law school research.

Let us, therefore, conclude this Article by sketching, and accounting for, Tushnet's more modest, but still ostensibly Marxist position on the law's analysis. I begin with the "accounting for" because, if I am right, it makes the substance of Tushnet's position more easily understandable.

First, let us try to explain his retreat from the 1978 idea of a grand theory explaining both form and content in American law. I detect three prime causes.

One lies in the extent to which he is consistently impressed by what he takes to be the "true truths" of early twentieth century American Legal Realism as well as of its more recent manifestations. Over and over again, in his critiques of conventional "liberal pluralist" and conventional "formalist" legal scholarship, he uses a "legal realist truth" to (he thinks) show conclusively that a particular contention (from either "school") is wrong. The "truth" is that there is no principled order in the law because any clever²⁶⁷ judge can manipulate precedent to reach any result he wishes. Therefore, asserts Tushnet, any argument for a principled formalist order in the set of cases under consideration is erroneous.

Yet, and this is the second cause, the most obvious analytic stance to derive from this "truth" — legal nihilism — appalls him morally more than it appeals to him intellectually. Although he seems at times fascinated by the "cold steel" side of, for example, Holmes' legal realism (with small letters), he does not share the Holmesian delight in perceiving the mailed fist beneath the velvet

267. See Tushnet, 1978 MARXIST PERSPECTIVES, *supra* note 228, at 99. The "relative cleverness" of judges is also a theme in Tushnet's legal historical writing. It relates, though he never quite says so, to "relative autonomy."

glove,²⁶⁸ or for that matter, Posner's delight in taking from *X* to give to *Y* for reasons of economic efficiency. It may be sensible judicial behavior for judges to recognize, as Holmes would have had them do,²⁶⁹ imminent shifts in the balance of power among more and less fortunate societal groupings, and "a-morally" rubber-stamp such shifts rather than blocking the redistributive way. But, for Tushnet, that is not enough. For, even if judges do not block the shift for long,²⁷⁰ people suffer in the meantime. Moreover, nothing in legal nihilism explains why some politicians, including judges, block the shift while others stand aside and still others abet the shift. Nor do the intellectual puerilities of political science's "behavioralism derivative" explanations of judicial behavior begin genuinely to explain why judges behave as they do,²⁷¹ why they participate in the judicially wrought wrongs this day, or any other day, done let alone atone for them.²⁷² Hence, Tushnet is driven to search out an explanatory model of law and humanity, and inhumanity, that might explain, even as it might partially exculpate, that which contemporary judges, legal scholars, and mere persons do and do not do in hurting each other. Having described as his most important concern the hurts inflicted on mere persons in this vale of post-industrial existence, Tushnet goes straight, not to a single, but to one primary, and two secondary goals. The primary recourse is to a, if not *the*, major

268. See Tushnet, *The Logic of Experience: Oliver Wendell Holmes on the Supreme Judicial Court*, 63 VA. L. REV. 975 (1977).

269. See *id.* at 1030.

270. As did, according to the conventional liberal pluralist view of the matter, the Supreme Court majority from the *Lochner* era until 1937. For a more benign view of the Court during much of that time, see J. SEMONCHE, CHARTING THE FUTURE: THE SUPREME COURT RESPONDS TO A CHANGING SOCIETY, 1890-1920 (1978).

271. Tushnet is generally among the more sympathetic of law school scholars toward political-science-in-law. But he can be severe about certain aspects of its behavioral branch. Thus:

The next move was to look for the origins of . . . policy preferences in the social origins and political experiences of the judges. [Citing G. SCHUBERT, *THE JUDICIAL MIND: THE ATTITUDES AND IDEOLOGIES OF SUPREME COURT JUSTICES, 1946-1963* (1965).]

There is of course something to this kind of argument, but it suffers from an unbearable simple-mindedness. Many law professors . . . have spent one or two years as a law clerk to a judge. They know from experience that the vote-counters do not describe what really happens when a judge makes a decision and, with the assistance of people like themselves, writes an opinion. Further, the reductionist account may have had a core of truth in it, but it eliminated much of the richness of the system of legal rules and institutions. Even if it was all a silly game, that game was elaborately choreographed in ways that the vote-counters could not understand.

Tushnet, *Post-Realist Legal Scholarship*, 1980 WIS. L. REV. 1383, 1397 (1980). He concludes with beautiful aptness: "It is as if a scene in a ballet were described by saying that the male character moved from left to right while the female character moved upstage. It is true enough—but somehow lacking in flavor." *Id.*

272. See *Plessy v. Ferguson*, 163 U.S. 537, 562 (1896) (Harlan, J., dissenting): "The thin disguise of 'equal' accommodations for passengers in railroad coaches will not mislead anyone, nor atone for the wrong this day done."

mode of post-1800 Western analysis that purports to explain the material sources of the human condition in industrial society — to Marxism.²⁷³

The two secondary goals flow from this primary recourse. One secondary goal, really an embrace, is phenomenology. It is pursued, I surmise, on the assumption that it may explain part of the gap left by “crude Marxism” — namely, why the normal run of persons, and judges, (mis)perceive as they do. The other secondary goal, also involving an embrace out of faith, is semiology. Thus:

The most promising line of investigation . . . is . . . opened up by . . . the unholy trinity of semiology, phenomenology, and Marxism. . . . [W]hy do people think the way they do? The essential contribution of semiology has been to show how complex ways of thinking are—how ways of thinking indeed make totalistic claims on all who share them. The essential contribution of phenomenology has been to show how forms of life work themselves into complex ways of thinking. And the essential contribution of Marxism has been to show that the fundamental forms of life are those implicated in material social relations of production—and that those relations, because they contain contradictions, allow contradictory ways of thinking to develop.²⁷⁴

Thus, Tushnet opts for “Marxism-plus.”

To say this is to point to the instability of Tushnet’s 1978 grand theory solution, and to the third cause of his recession from predicting the success of grand theory. The combination of “Marxism-plus-semiology-plus-phenomenology” leads toward scrutiny of the “meaning-content” of Marxist language, in part because of analytic queries about language common to both semiology and phenomenology and in part because both have developed at least in “Continental” part against the “Viennese-Anglo-American” backdrop of linguistic positivism and its progeny. Therein, arguably, at least from the perspective of its Anglo-American reception, has lain Marxism’s Achilles’ heel. It has been, in its pre-revisionist forms at least, notoriously un-self-analytic as to how its language, in summing human experience, reconstructs, elides, and foreshortens that experience. That lack of self-critical awareness has made it easy — for better or worse — for the Anglo-American empiricist mode of

273. Let me emphasize that I mean Marxism, not Leninism or Maoism. The recourse is tempting for any thinking and feeling academic who is neither endowed at a deep level with the whimsical pessimism about human destiny that makes for cavalier conservatism, nor possessed of the possessions that make for self-interested conservatism, nor imbued with the capacity to truncate intellectual from psychic terms of existence that lead to adopting conventional law or social science pluralist research norms while “voting for (a little) change” as persons, nor yet endowed with the sheer unoriginality, the moral indifference, of most essentially derivative academic intellects.

274. Tushnet, *supra* note 271, at 1399.

thinking to reject Marxism as verbally careless, hence not to be taken seriously.

This, very likely, accounts for the first of four main characteristics that differentiate Tushnet's "weaker Marxist approach" from his 1978 grand version. Those four characteristics are (1) a sense that Marxist language is often awkwardly metaphorical; (2) a concomitant uncertainty about whether such language can adequately cope with four recurrent criticisms of Marxist theory in general; (3) doubt not only as to the capacity of a Marxist explanation of law to explain its "content" but also about its capacity to explain much of the law's form; and (4) substantial inspecificity concerning that which remains distinctively Marxist about what is left in the approach.

With respect to the first characteristic — the metaphoric deficiencies of Marxist explanatory language — the "current Tushnet" almost gives up on any concerted defense, saying, for example: "A Marxist analysis of law claims that there is a reasonably systematic relation between the law and the relations of production, with the latter *more or less sort of determining* the former. (The fuzziness is . . . inevitable.)"²⁷⁵ Elsewhere, he contrasts reductionism and liberalism, which appear to have adequate metaphors as to what law is and how it functions, with Marxism, which does "not have the metaphors at hand for 'relative autonomy.'"²⁷⁶

As to the second characteristic, Tushnet recognizes four recurrent criticisms of Marxism: (a) a problem of mechanism, which most non-Marxists attack;²⁷⁷ (b) the problem of law as constitutive, which "arises pretty much within the Marxist camp";²⁷⁸ (c) the problem of reification, which he argues is "the peculiar American contribution to the discussion";²⁷⁹ and (d) the problem of the extent to which

275. Tushnet, 1983 Marxism as Metaphor, *supra* note 228, at 1 (emphasis added).

276. Tushnet, BRITISH REVIEW, *supra* note 228, at 123.

277. The problem is to explain the mechanism by which capitalist law subserves ruling class interests — given judges' formal independence from class pressures as well as the scantiness of evidence indicating that judges believe that they are not independent or that they act as "instruments of the ruling class." Tushnet, 1983 Marxism as Metaphor, *supra* note 228, at 1.

278. *Id.* The problem of law as constitutive is:

[i]n its simplest version . . . : class relations are defined in terms of whether or not members of a class own the means of production. Yet ownership is a legal category which takes on its meaning only because of its relation to all the other available legal categories. Law thus seems to define or constitute class relations, in which case it is circular to say that the relations of production sort of determine the law. How then is a Marxist analysis of law possible?

Id. at 1-2.

279. *Id.* at 2. One could argue with Tushnet's view that there is something particularly distinctive about American legal realism as a source of objections that Marxist language is unduly prone to reification. But here is his statement of the problem:

Most Marxists seem to want to say that a rule of law — the fellow servant rule is a classic

Marxist analysis is "scientific" or "normative."²⁸⁰ Tushnet's discussion of these problems is disarmingly frank. But some of his conclusions — for example, that the most satisfactory answers to the problems of mechanism and of law as constitutive "weaken the claim that Marxists have a special way of analyzing the law"²⁸¹ — run the risk of disarming the analysis entirely. So too, his declarations "that one cannot readily distinguish within the Marxist tradition between Marxism as a sociological/historical theory and Marxism as a normative critique of capitalism,"²⁸² and that "it is more fruitful"²⁸³ to assume that a Marxist theory must be sociological with "the normative critique . . . immanent in the theory,"²⁸⁴ do not really get us very far.

With respect to the third characteristic, Tushnet, after deciding that Marxism is not likely to explain effectively the content of capitalist law, even waffles as to Marxism's ability to explain that law's form. Having agreed with Hugh Collins that the only explanatory candidate is "one that deals with the form and not the content of the law," and that the "commodity exchange theory is the leading, perhaps the only, contender of that [form-only-explaining] sort,"²⁸⁵ Tushnet goes on to argue that a "Marxist theory of the legal form may be impossible."²⁸⁶

What, then, are we left with if not substantial uncertainty as to what is distinctively Marxist? We have a concern for setting about the hard work of developing a position between liberalism and reductionism,²⁸⁷ a concern for explaining the law's "relative autonomy," and a set of unsolved analytic problems about the law's relationship to the economic infrastructure. We have also an inher-

example—serves class interests. Yet the legal realists taught us that there never was a "fellow servant rule" that could be a dependent variable to be explained in terms of its links to the economic base. There were and always are rules and counter-rules, rules with exceptions of such scope as to threaten the rule itself, rules whose force can be eliminated by creatively drawing on analogies to apparently unrelated areas of law, and so on. Statutes too have to be interpreted . . . and cannot be understood as . . . words whose meaning is fixed at the time of enactment. What then can Marxist analysis try to analyze?

Id. at 2. I am not convinced that all these problems are exactly mind-stumpers.

280. Tushnet, 1981 Marxist Theory, *supra* note 228, at 3.

281. Tushnet, 1983 Marxism as Metaphor, *supra* note 228, at 2 (discussing Hugh Collins' answer to these problems in H. COLLINS, *MARXISM AND LAW* (1982)).

282. Tushnet, 1981 Marxist Theory, *supra* note 228, at 3.

283. *Id.*

284. *Id.*

285. Tushnet, 1983 Marxism as Metaphor, *supra* note 228, at 15 (discussing H. COLLINS, *supra* note 281).

286. Tushnet, 1983 Marxism as Metaphor, *supra* note 228, at 15.

287. See Tushnet, *BRITISH REVIEW*, *supra* note 228, at 122.

ent normative critique of capitalism and of legal scholars who do their scholarship, whether as liberals or as conservatives, without regard to the norms embraced in that critique. What does that amount to? Tushnet concedes the resultant analytic anemia, though he declares that he is "comfortable with such an anemic reconstruction of a Marxist theory of law"²⁸⁸ — even if the reconstruction looks more like destruction and even if the end point seems very "close to liberal sociology."²⁸⁹

THE ROAD AHEAD

If that were all that could be said about Tushnet's Marxist theory of American law, non-Marxists might reasonably close the book on it without more. Nor would Tushnet's three reasons for referring to his position as Marxist, given just after the above-quoted declaration of satisfaction with analytic anemia, convince us otherwise: (1) that "the effort to produce a sociological theory that is both good and distinctively Marxist may be thought to have failed, but negative results . . . are nonetheless important";²⁹⁰ (2) that "calling the theory Marxist is a statement of affiliation with an international tradition of struggle for liberation [including] the upheavals in Poland";²⁹¹ and (3) that it is important to "emphasiz[e] . . . political distance from liberalism."²⁹² This runs the danger of seeming closer to moral posturing than to something worth examining at length.

There are, however, the other "two faces" of Tushnet — those that appear when he turns from attempts to develop systematic theory to legal history and to critiques of contemporary constitutional scholarship. These represent, after all, the bulk of his analytic contributions to legal scholarship. Their examination may be worthwhile.

To anticipate the sequel to this Article, it may be argued that such examination *is* fruitful for three reasons. First, analysis of those contributions reveals that many of their strengths and weaknesses come from a curiously disjointed shoving together of "strong" Neo-Legal-Realist and "weak" Marxist approaches. Second and more specifically, this shoving together produces not analytic chaos or anemia in applied analysis, but rather a recurrent and unintentionally patterned series of insights and blindnesses about the state of con-

288. Tushnet, 1981 Marxist Theory, *supra* note 228, at 29.

289. *Id.*

290. *Id.*

291. *Id.* at 30.

292. *Id.*

temporary legal scholarship and late twentieth century American law. Third, construed together with other recent radical analyses — for example, those of Karl Klare and Roberto Unger — the upshot is a correct diagnosis of severe strain in the law's capacity to deal with American social and economic problems but an incorrect diagnosis as to the primary culprit — liberalism. American problems, I would argue, are more complex than that. So too, both their solutions and the roles of laws, judges, and legal scholars in venturing toward such solutions are more complicated than the problem-solving analytic recourse explicit in much "radical analysis" of American law — abjuring liberal law and liberal legalism in favor of Karl Marx.